Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 11 June 2015 [1]

Case C-160/14

João Filipe Ferreira da Silva e Brito and Others
v
Portuguese State

(Request for a preliminary ruling from the Varas Cíveis de Lisboa (Portugal))

(Approximation of laws — Transfer of an undertaking — Safeguarding of employees' rights — Obligation to make a reference for a preliminary ruling — Infringement of EU law attributable to a national court or tribunal against whose decisions there is no judicial remedy under national law — National legislation which makes the right to reparation for the loss or damage sustained as a result of such an infringement conditional on the prior setting aside of the decision which caused that loss or damage)

1. This request for a preliminary ruling concerns the interpretation of Article 1(1) of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, [2] as well as the third paragraph of Article 267 TFEU and the case-law of the Court on State liability arising from an infringement of EU law.

2. The questions referred by the Varas Cíveis de Lisboa (Court of First Instance, Lisbon) (Portugal) were raised in the context of an action for damages brought by Mr Ferreira da Silva e Brito and other applicants against the Portuguese State on the basis of an alleged infringement of EU law attributable to the Supremo Tribunal de Justiça (Supreme Court of Justice).

3. The examination of the first question will require me to interpret, in the light of the facts of the dispute in the main proceedings, the concept of 'transfer of a business' within the meaning of Article 1(1) of the Directive. I shall conclude, contrary to the solution adopted by the Supremo Tribunal de Justiça, that that provision must be interpreted as meaning that the concept of transfer of a business encompasses a situation in which an undertaking active on the charter flights market is wound up by decision of its majority shareholder, which is itself an undertaking active in the aviation sector and which, in the context of the winding up of the first undertaking:

— takes the place, in aircraft leasing contracts and ongoing charter flight contracts with tour operators, of the company being wound up;

— carries out activities previously pursued by the company being wound up;

1 — Original language: French.
2 — OJ 2001 L 82, p. 16 ('the Directive').

— reinstates some workers hitherto seconded to the company being wound up and engages them to perform identical tasks; and

— takes over small items of equipment from the company being wound up.

4. Next, I shall set out, as part of my examination of the second question, the reasons why the third paragraph of Article 267 TFEU must be interpreted as meaning that a national court or tribunal against whose decisions there is no judicial remedy under national law, such as the Supremo Tribunal de Justiça, was obliged, in circumstances such as those at issue in the main proceedings, to make a reference to the Court for a preliminary ruling.

5. Finally, in the context of my examination of the third question, I shall explain why, in circumstances such as those at issue in the main proceedings, EU law, and in particular the case-law devolving from the judgment in *Köbler*,[3] must be interpreted as meaning that it precludes a national State liability regime which makes the right to reparation conditional upon the prior setting aside of the decision which caused the loss or damage.

I – **Legal framework**

A – *EU law*

6. The Directive codifies Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses,[4] as amended by Council Directive 98/50/EC of 29 June 1998.[5]

7. Recital 8 in the preamble to the Directive states:

'Considerations of legal security and transparency required that the legal concept of transfer be clarified in the light of the case-law of the Court of Justice. Such clarification has not altered the scope of Directive 77/187 … as interpreted by the Court of Justice.'

8. Article 1(1)(a) and (b) of the Directive provides:

'(a) This Directive shall apply to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger.

(b) Subject to subparagraph (a) and the following provisions of this Article, there is a transfer within the meaning of this Directive where there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.'

9. The first subparagraph of Article 3(1) of the Directive provides:

'The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee.'

3 — C-224/01, EU:C:2003:513.

4 — OJ 1977 L 61, p. 26.

5 — OJ 1998 L 201, p. 88.

B – *Portuguese law*

10. Article 13 of the Rules on the non-contractual civil liability of the State and other public bodies,[6] adopted by Law No 67/2007 (Lei que aprova o Regime da Responsabilidade Civil Extracontratual do Estado e Demais Entidades Públicas) of 31 December 2007,[7] as amended by Law No 31/2008 of 17 July 2008,[8] provides as follows:

'1. Without prejudice to situations involving wrongful criminal convictions and unjustified deprivations of liberty, the State shall be liable at civil law for the loss or damage arising from judicial decisions which are manifestly unconstitutional or unlawful or unjustified as a result of a manifest error in the assessment of the facts.

2. The claim for damages must be based on the prior setting aside of the decision that caused the loss or damage by the court having jurisdiction.'

II – **Facts of the dispute in the main proceedings and the questions referred for a preliminary ruling**

11. On 19 February 1993, Air Atlantis SA ('AIA'), which was established in 1985 and operated in the non-scheduled air transport (charter flights) sector, was wound up. As part of that process, the applicants in the main proceedings were the subject of a collective redundancy measure.

12. From 1 May 1993, the company Transportes Aéreos Portugueses ('TAP'), which was AIA's main shareholder, began to operate some of the flights which AIA had already contracted to provide over the period from 1 May to 31 October 1993. TAP also operated a number of charter flights, a market on which it had not hitherto been active, as the routes in question were routes previously served by AIA. To that end, TAP used some of the equipment which AIA had previously used for its activities, in particular four aeroplanes. TAP also assumed responsibility for the payment of charges under the related leasing contracts and took over the office equipment which was in AIA's possession and which the latter used at its premises in Lisbon (Portugal) and Faro (Portugal), as well as other material assets. In addition, TAP recruited some former AIA employees.

13. The applicants in the main proceedings subsequently brought an action against that collective redundancy before the Tribunal de Trabalho de Lisboa (Lisbon Labour Court) by which they sought reinstatement within TAP and the payment of remuneration.

14. By judgment of the Tribunal de Trabalho de Lisboa of 6 February 2007, the action brought against the collective redundancy was upheld in part, inasmuch as that court ordered that the applicants in the main proceedings be reinstated in the corresponding grades and that compensation be paid. In support of its judgment, the Tribunal de Trabalho de Lisboa found that, in the present case, there was a transfer of a business, at least in part, in so far as the identity of the business had been retained and its activities had been continued, TAP having replaced the former employer in the contracts of employment.

6 — The 'RRCEE'.

7 — *Diário da República*, Series 1, No 251, of 31 December 2007.

8 — *Diário da República*, Series 1, No 137, of 17 July 2008.

15. An appeal was lodged against that judgment before the Tribunal da Relação de Lisboa (Lisbon Court of Appeal), which, by its judgment of 16 January 2008, set aside the judgment given at first instance in so far as it had ordered TAP to reinstate the applicants in the main proceedings and pay compensation: that court concluded that the action against the collective redundancy at issue was time barred and took the view that there had not been a transfer of a business, or part of a business, between AIA and TAP.

16. The applicants in the main proceedings then brought an appeal in cassation before the Supremo Tribunal de Justiça, which, in its judgment of 25 February 2009, held that the collective redundancy was not tainted by any illegality. That court, reiterating the line of argument advanced by the Tribunal da Relação de Lisboa, held that the fact that a commercial activity is 'merely continued' is not sufficient to support the conclusion that there has been a transfer of a business, since the identity of the business must also be retained. In the present case, when it operated the flights over the course of the summer of 1993, TAP did not use an 'entity' with the same identity as the 'entity' previously belonging to AIA, but used its own instrument for operating on the market in question, namely its own undertaking. In the view of the Supremo Tribunal de Justiça, a transfer of a business cannot be said to have occurred since the two 'entities' are not identical.

17. With regard to EU law, the Supremo Tribunal de Justiça stated that the Court of Justice, when faced with situations in which an undertaking pursued activities hitherto carried on by another undertaking, had held that it could not be concluded on the basis of that 'mere fact' that an economic entity had been transferred, since '[a]n entity cannot be reduced to the activity entrusted to it'. [9]

18. In response to a request by some of the applicants in the main proceedings that the Supremo Tribunal de Justiça make a reference to the Court of Justice for a preliminary ruling, the Supremo Tribunal de Justiça observed that '[t]he obligation to make a reference for a preliminary ruling, which is incumbent upon national courts and tribunals against whose decisions there is no judicial remedy under national law, exists only where those courts and tribunals find that recourse to [EU] law is necessary in order to resolve the dispute before them and, in addition, a question concerning the interpretation of that law has arisen'.

19. The Supremo Tribunal de Justiça also found that '[t]he Court of Justice itself has expressly recognised that "the correct application of [EU] law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved", thus removing the obligation to make a reference for a preliminary ruling in that situation too. In addition, in the light of the content of the provisions of [EU law] cited by the [applicants in the main proceedings] and the interpretation of those provisions by the Court of Justice … and in view of the features of the case … which have been taken into consideration …, there can be no material doubt as to interpretation which would make a reference for a preliminary ruling necessary'.

20. In addition, the Supremo Tribunal de Justiça also stated that 'the Court of Justice [had] developed settled case-law on the issue of the interpretation of the rules [of EU law] relating to the "transfer of a business", and the … Directive … already gives effect to the consolidation of the concepts set out therein which that case-law has brought about, and those concepts are now so clear in terms of their interpretation in case-law (both Community and national) that there is no need, in the present case, for prior consultation of the Court of Justice'.

9 — The Supremo Tribunal de Justiça refers, in this regard, to paragraph 15 of the judgment in *Süzen* (C-13/95, EU:C:1997:141).

21. The applicants in the main proceedings then brought an action for a declaration of non-contractual civil liability against the Portuguese State, claiming that the latter should be ordered to make good certain material damage caused. In support of their action, they submit that the judgment of the Supremo Tribunal de Justiça is manifestly unlawful, in so far as it entails a misinterpretation of the concept of a transfer of a business within the meaning of the Directive and in so far as that court infringed its obligation to refer to the Court of Justice the appropriate questions concerning the interpretation of EU law.

22. The Portuguese State contends that, pursuant to Article 13(2) of the RRCEE, a claim for damages requires the prior setting aside of the decision that caused the loss or damage by the court having jurisdiction, and submits that, since the judgment of the Supremo Tribunal de Justiça has not been set aside, the damages sought were not payable.

23. The referring court explains that it is necessary to ascertain whether the judgment given by the Supremo Tribunal de Justiça is manifestly unlawful in that it incorrectly interprets the concept of 'transfer of a business' in the light of the Directive and having regard to the facts before it. In addition, it must be determined whether the Supremo Tribunal de Justiça was obliged to make the reference for a preliminary ruling which it had been asked to make.

24. In those circumstances the Varas Cíveis de Lisboa decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must [the] Directive …, in particular Article 1(1) thereof, be interpreted as meaning that the concept of a "transfer of a business" encompasses a situation in which an undertaking active on the charter flights market is wound up by decision of its majority shareholder, itself an undertaking active in the aviation sector, and, in the context of the winding up, the parent company:

— takes the place, in aircraft leasing contracts and ongoing charter flight contracts with tour operators, of the company being wound up;

— carries out activities previously pursued by the company being wound up;

— reinstates some workers hitherto seconded to the company being wound up and engages them to perform identical tasks;

— receives small equipment from the company being wound up?

(2) Must Article 267 … TFEU be interpreted as meaning that, in the light of the facts set out in the [first] question and the fact that the lower national courts adjudicating on the case adopted contradictory decisions, the Supremo Tribunal de Justiça was under an obligation to refer to the Court … for a preliminary ruling the question of the correct interpretation of the concept of a "transfer of a business" within the meaning of Article 1(1) of [the] Directive …?

(3) Do [EU] law and, in particular, the principles laid down by the Court … in *Köbler* (C-224/01, EU:C:2003:513) on State liability for loss or damage caused to individuals as a result of an infringement of [EU] law by a national court adjudicating at last instance preclude the application of a national provision which makes a claim for damages against the State conditional upon the decision that caused the loss or damage having first been set aside?'

III – **Analysis**

A – *The first question*

25. By its first question, the referring court wishes to ascertain whether a 'transfer of a business' within the meaning of Article 1(1) of the Directive may exist in a situation in which an undertaking active on the charter flights market is wound up by decision of its majority shareholder, which is itself an undertaking active in the aviation sector and which, in the context of the winding up of the first undertaking:

— takes the place, in aircraft leasing contracts and ongoing charter flight contracts with tour operators, of the company being wound up;

— carries out activities previously pursued by the company being wound up;

— reinstates some workers hitherto seconded to the company being wound up and engages them to perform identical tasks; and

— takes over small items of equipment from the company being wound up.

26. As is clear from recital 3 in the preamble to the Directive and from Article 3 thereof, the aim of the Directive is to protect employees by ensuring that their rights are safeguarded in the event of the transfer of an undertaking.[10] To that end, the first subparagraph of Article 3(1) of the Directive provides that the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer are, by reason of such transfer, to be transferred to the transferee. As for Article 4(1) of the Directive, it protects employees from any dismissal decided upon by the transferor or the transferee solely on the basis of the transfer.

27. In accordance with Article 1(1)(a) thereof, the Directive is to apply to any transfer of an undertaking, business or part of an undertaking or business to another employer as a result of a legal transfer or merger. The Court has interpreted the concept of 'legal transfer' flexibly in keeping with the objective of the Directive, which is to safeguard employees in the event of a transfer of their undertaking.[11] Thus, the Court has held that the Directive is applicable wherever, in the context of contractual relations, there is a change in the natural or legal person responsible for carrying on the undertaking who incurs the obligations of an employer towards employees of the undertaking.[12]

28. The Court has already held that Directive 77/187 was applicable to transfers between companies within one and the same group.[13]

10 — See, inter alia, order in *Gimnasio Deportivo San Andrés* (C-688/13, EU:C:2015:46, paragraph 34 and the case-law cited).

11 — See, inter alia, judgment in *Jouini and Others* (C-458/05, EU:C:2007:512, paragraph 24 and the case-law cited).

12 — See, inter alia, judgment in *Amatori and Others* (C-458/12, EU:C:2014:124, paragraph 29 and the case-law cited).

13 — See, inter alia, judgment in *Allen and Others* (C-234/98, EU:C:1999:594, paragraphs 17, 20 and 21).

29. It has also specified the conditions in which Directive 77/187 applies in the event of a transfer of an undertaking wound up by the court or voluntarily. Thus, although the Court held, in its judgment in *Abels*,[14] that that directive does not apply to the transfer of an undertaking, business or part of a business in the context of insolvency proceedings,[15] it nevertheless held, in its judgment in *Dethier Équipement*,[16] that that directive applies in the event of the transfer of an undertaking which is being wound up by the court if the undertaking continues to trade.[17] In its judgment in *Europièces*,[18] it came to the same conclusion in relation to a transferred undertaking being wound up voluntarily.[19]

30. It follows both from the flexible interpretation that must be given to the concept of legal transfer and from the case-law of the Court relating specifically to a situation in which the entity transferred is being wound up that the dissolution and winding up of AIA are capable of constituting a 'transfer of a business' within the meaning of Article 1(1)(a) of the Directive.

31. However, the transfer must still satisfy the conditions laid down in Article 1(1)(b) of the Directive, which is to say that it must relate to an economic entity, understood as being 'an organised grouping of resources which has the objective of pursing an economic activity, whether or not that activity is central or ancillary', which retains its 'identity' following the transfer.

32. In order to establish that an undertaking has been transferred, it is therefore necessary that the decisive criterion for the existence of such a transfer be met, namely that the entity in question must keep its identity after being taken over by the new employer.[20]

33. In order to determine whether that condition is met, it is necessary to consider all the facts characterising the transaction in question, including in particular the type of undertaking or business, whether or not its tangible assets, such as buildings and movable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, for which those activities were suspended. However, all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation.[21]

34. The Court has made it clear that a national court, in assessing the facts characterising the transaction in question, must take into account among other things the type of undertaking or business concerned. It follows, in the view of the Court, that the degree of importance to be attached to the various criteria for determining whether or not there has been a transfer within the meaning of the Directive will necessarily vary according to the activity carried on, and indeed to the production or operating methods employed in the relevant undertaking, business or part of a business.[22]

35. Consequently, the weight to be attached to the various factors used to determine whether the entity in question keeps its identity after being taken over by the new employer, and whether a transaction may therefore be regarded as a 'transfer' within the meaning of Article 1(1) of the Directive, varies according to the type of activity carried on by the undertaking in question.

14 — 135/83, EU:C:1985:55.

15 — Paragraph 30.

16 — C-319/94, EU:C:1998:99.

17 — Paragraph 32.

18 — C-399/96, EU:C:1998:532.

19 — Paragraph 35.

20 — See, inter alia, judgment in *Amatori and Others* (C-458/12, EU:C:2014:124, paragraph 30 and the case-law cited).

21 — See, inter alia, judgments in *Spijkers* (24/85, EU:C:1986:127, paragraph 13); *Redmond Stichting* (C-29/91, EU:C:1992:220, paragraph 24); *Süzen* (C-13/95, EU:C:1997:141, paragraph 14); and *Abler and Others* (C-340/01, EU:C:2003:629, paragraph 33).

22 — See, inter alia, judgment in *Liikenne* (C-172/99, EU:C:2001:59, paragraph 35 and the case-law cited).

36. The decisive factor is whether the entity at issue retains its identity, a circumstance which arises in particular where significant tangible or intangible assets are transferred and where the operation of that entity is actually continued or taken over by the new employer in order to pursue the same or similar activities. Those two conditions are satisfied in the present case.

37. It is true that, with regard to the transfer of significant tangible or intangible assets, the Court has held that an economic entity may, in certain sectors, be able to function without such assets, so that the maintenance of the identity of such an entity following the transaction affecting it cannot, logically, depend on the transfer of such assets. [23]

38. However, as is clear from the case-law of the Court, the position is different for undertakings which operate in sectors that require the use of significant assets. This is the case, for example, in relation to the bus transport sector, which requires substantial plant and equipment. In that situation, the Court found that the fact that the tangible assets used for the operation of the bus routes were not transferred from the old to the new contractor constituted a factor to be taken into account. [24] The Court inferred from this that, in a sector such as scheduled public transport by bus, where the tangible assets contribute significantly to the performance of the activity, the absence of a transfer to a significant extent from the old to the new contractor of such assets, which are necessary for the proper functioning of the entity, must lead to the conclusion that the entity does not retain its identity. [25]

39. It follows from that case-law that, in a case such as that at issue in the main proceedings, which also relates to the transport sector, the transfer of significant tangible assets must be regarded as being a key factor for the purpose of determining whether what we have here is a 'transfer of a business' within the meaning of Article 1(1) of the Directive.

40. In its assessment of the circumstances of fact surrounding the transaction at issue, the referring court will therefore have to attach particular weight to the factor relating to the transfer of significant tangible assets to TAP.

41. In that regard, it is established that TAP took over the leasing contracts relating to four aircraft which had previously been used by AIA in the course of its activities. It is clear from the file that one of the reasons for that takeover was TAP's desire to neutralise the negative financial consequences which could have resulted from the early termination of such contracts. However, the reasons forming the basis of TAP's decision to take over the leasing contracts relating to four aircraft hitherto used by AIA are immaterial for the purpose of classifying a transaction as a 'transfer' within the meaning of Article 1(1) of the Directive. The only decisive factor is the objective finding that those contracts were actually transferred to TAP when AIA was wound up and that TAP continued to use the aircraft in question.

42. As the applicants in the main proceedings rightly point out, the view cannot be taken that, because TAP is the majority shareholder and principal creditor of AIA, it is at liberty to dispose of an undertaking within its group and to take over its assets without being subject to the obligations under the Directive.

43. Also immaterial is the fact that the aircraft taken over by TAP were used interchangeably for scheduled and non-scheduled transport. What matters is that those aircraft were used, albeit only in part, in the context of TAP's non-scheduled transport activity, which constitutes the continuation of an activity previously carried on by AIA.

23 — Ibid. (paragraph 37 and the case-law cited).

24 — Ibid. (paragraph 39 and the case-law cited).

25 — Ibid. (paragraph 42 and the case-law cited).

44. In addition, the fact that the aircraft taken over were subject to a leasing arrangement is not a bar to the existence of a transfer of a business since the decisive factor is the continued use of those assets by the transferee.

45. Finally, the fact that the aircraft were returned at the end of the leasing contracts, between 1998 and 2000, is also irrelevant. What matters is that the contracts were actually transferred and that the aircraft were actually used by TAP over a significant period of time.

46. It follows from the foregoing that the referring court's finding that TAP took the place of the company being wound up in the aircraft leasing contracts is a significant indication that there was a transfer of a business in that it attests to the fact that TAP took over assets essential to the continuation of the activity previously pursued by AIA.

47. That finding is supplemented by the further finding that TAP also took over small items of equipment from the company being wound up, such as on-board equipment and office equipment. This constitutes additional evidence that there was a transfer of a business.

48. Furthermore, it is apparent from the file that TAP replaced the company being wound up in the ongoing charter flight contracts with tour operators and did so in order to develop the activities previously pursued by that company. It follows from the case-law of the Court that the transfer of customers is a relevant indication of the existence of a transfer of an undertaking. [26]

49. The Supremo Tribunal de Justiça appears to take the view that the fact that TAP was authorised to operate on the charter flights market and that it had already done so 'on an ad hoc basis' precluded the existence of a 'transfer of a business' within the meaning of the Directive. However, I share the view of the applicants in the main proceedings that the fact that an undertaking is already active or capable of being active on a particular market does not prevent that undertaking from ensuring the continuity of similar activities carried on by another undertaking which has since been wound up and from thereby extending its own activities.

50. With regard to the flights operated in 1994 in particular, these, as the Supremo Tribunal de Justiça held in its judgment, were the subject of contracts which TAP concluded directly with tour operators in respect of routes which it had not hitherto operated because they were traditionally AIA routes. In the view of the Supremo Tribunal de Justiça, 'TAP carried on an activity, as any airline could have done, which amounts to nothing more than filling a space on the market left by the closure of AIA'.

51. However, as the applicants in the main proceedings rightly point out, the very fact that TAP began to pursue an activity previously pursued by another undertaking within its group which it had in the meantime wound up is a significant indication that there was a transfer of a business, inasmuch as it attests to the continuation by TAP of an activity previously carried on by AIA.

52. In its judgment, the Supremo Tribunal de Justiça relies on the judgment in *Süzen* [27] to support its view that the mere continuation of an activity carried on by another undertaking is not sufficient to establish the existence of a transfer of a business. [28] However, it is clear from the case-law of the Court that, where the continuation of an activity in this way is coupled with the takeover of significant assets, there can be little doubt that a business has been transferred.

26 — See point 33 of this Opinion.

27 — C-13/95, EU:C:1997:141.

28 — Paragraph 15.

53. TAP's continuation of the activity previously pursued by AIA is also illustrated by further evidence advanced by the referring court, namely the reinstatement within TAP of workers hitherto seconded to AIA for the performance of tasks identical to those which they previously performed within the latter company.

54. As the Supremo Tribunal de Justiça held in its judgment, it has been established that, following the winding up of AIA, two employees who had hitherto been on secondment from TAP to AIA's commercial directorate were appointed by TAP, within its own commercial directorate, to posts in the area of ad hoc non-scheduled flights and charter flight contracts for the summer 1993 scheduling season.

55. According to the Supremo Tribunal de Justiça, this is not a case of TAP retaining workers previously employed by AIA. Those workers were linked to TAP by a contract of employment. They were therefore workers employed by TAP and not by AIA. The employees concerned were seconded by TAP to perform functions at AIA and, following the winding up of AIA, returned to the undertaking that employed them. In its judgment, the Supremo Tribunal de Justiça thus takes the view that the return of the TAP workers to their undertaking following the winding up of AIA, to which they had been seconded, results from the performance of the contract of employment which they concluded with their employer, namely TAP. Even though those workers were assigned to posts corresponding to their grade and, over the summer of 1993, performed functions in the area of the non-scheduled flights operated by TAP that year, the activities of those workers within TAP cannot, in the view of the Supremo Tribunal de Justiça, serve as a basis for identifying the organisation of an independent economic entity dedicated to non-scheduled flights.

56. However, as the applicants in the main proceedings rightly state, the fact that the two employees were reassigned, within TAP, to roles directly linked to the non-scheduled flights sector shows that TAP carried on AIA's activity, which had previously been performed on a purely ad hoc basis, and therefore tends to lend support to the argument that there was a transfer of a business. In addition, those employees appear to form an 'organised grouping',[29] since they were assigned within TAP to roles similar to those which they used to perform at AIA.

57. Attention must be drawn to the degree of similarity between the activities pursued before and after the transfer as further evidence of the existence of a transfer of a business. As the Commission points out, AIA was an air transport undertaking specialising in non-scheduled flights. TAP, whose core business is air transport, was authorised to operate both scheduled flights and non-scheduled flights and could therefore operate on the charter flights market, which it already did, albeit on an ad hoc basis.[30] There is therefore a high degree of similarity between the activities pursued by the two undertakings.

58. With regard, finally, to the criterion relating to any suspension of activity, it has been established that TAP had begun as early as 1 May 1993, that is to say, immediately after the winding up of AIA, to operate at least some of the charter flights which AIA had contracted to operate for the summer 1993 season. There was therefore no suspension of activity for a significant period of time. On the contrary, there was continuity of the activity in question, since some fifteen days after the winding up of AIA, TAP replaced AIA for the purposes of performance of the contracts relating to the flights concerned.

59. I am of the view that all of the abovementioned indications attest to the existence of a 'transfer of a business' within the meaning of Article 1(1) of the Directive.

29 — Judgment in *Jouini and Others* (C-458/05, EU:C:2007:512, paragraph 32).

30 — The Commission refers to the judgment of the Supremo Tribunal de Justiça.

60. However, the Supremo Tribunal de Justiça came to a different conclusion because it adopted an excessively restrictive interpretation of the condition that the transferred entity must retain its identity. More specifically, the line of reasoning followed by that court does not at any point mention a judgment of the Court of Justice which should in fact have pointed it towards a different conclusion, namely the judgment in *Klarenberg*,[31] which pre-dates the judgment of the Supremo Tribunal de Justiça by several days and in which the Court endorses the Opinion of Advocate General Mengozzi, which had been delivered on 6 November 2008.[32]

61. In its judgment, the Supremo Tribunal de Justiça attached particular importance to the criterion to the effect that, in order for a 'transfer' within the meaning of Article 1(1)(b) of the Directive to be found to exist, it must be possible to identify within the transferee the economic unit which has been transferred.[33]

62. In that connection, the Supremo Tribunal de Justiça stated that it had not been shown that TAP had set up a non-scheduled flights service precisely transposing the structure previously employed by AIA. Taking into account all the facts established, the Supremo Tribunal de Justiça came to the view that TAP did not take over an economic entity with the direct and independent intention of carrying on the charter flight activity which had previously been pursued by AIA. In particular, there was no transfer of a number of separate components that were subsequently reorganised within TAP and thus gave rise to the emergence of an independent undertaking or business. In addition, there is nothing to indicate the existence at TAP of a dedicated charter flights business unit that is independently organised for that purpose.

63. According to the Supremo Tribunal de Justiça, an overall analysis of the evidence does not make it possible to identify, within TAP, a collection of material and human resources providing support for a charter flights business that was independently organised for that purpose, that is to say, an economic entity which retains its identity and independently pursues a non-scheduled commercial aviation activity within TAP. On the contrary, the Supremo Tribunal de Justiça states that AIA's equipment, which TAP later used, was assimilated into TAP's assets, and that TAP operated scheduled and non-scheduled flights for which it used, without distinction, its personnel and the equipment belonging to its airline.

64. In response to that line of argument, it must be made clear that, for the purposes of the Directive, there can be a transfer in which the entity transferred retains its identity even where that entity does not keep its independent organisational structure. In other words, contrary to what was held by the Supremo Tribunal de Justiça, the condition as to the maintenance of identity does not mean that the economic entity transferred must retain its independence within the structure of the transferee.

65. In the case which gave rise to the judgment in *Klarenberg*,[34] the argument advanced by the defendant in the main proceedings was identical to that relied on by the Supremo Tribunal de Justiça to rule out the existence of a transfer of a business. That defendant contended that the 'economic entity', defined in Article 1(1)(b) of the Directive, retains its identity only if the organisational link which connects all of the staff and/or all of the elements is preserved. It argued that, by contrast, the economic entity transferred does not retain its identity in a situation where, following the transfer, it loses its organisational autonomy, the acquired resources having been integrated by the transferee into an entirely new structure.[35]

31 — C-466/07, EU:C:2009:85.

32 — Opinion of Advocate General Mengozzi in *Klarenberg* (C-466/07, EU:C:2008:614).

33 — Paragraph 3.6.1, final subparagraph.

34 — C-466/07, EU:C:2009:85.

35 — Paragraph 42.

66. The Court took the view that such an understanding of the identity of the economic entity, according to which that identity depends entirely on the factor relating to organisational autonomy, was untenable, in particular in the light of the objective pursued by the Directive, which consists in ensuring that the rights of employees are safeguarded effectively in the event of a transfer. According to the Court, that understanding would imply that, merely because the transferee decides to break down the part of the undertaking or business which it has acquired and to integrate it into its own structure, the Directive cannot be applied to that part of the undertaking or business, thus depriving the employees concerned of the protection afforded by it. [36]

67. With regard to the factor relating to the organisational aspect, the Court has previously held that that factor helps to define the identity of an economic entity. [37] However, it has also held that an alteration in the organisational structure of the entity transferred is not such as to prevent the application of the Directive. [38]

68. The Court has also found that 'Article 1(1)(b) of [the] Directive … defines the identity of an economic entity by referring to an "organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary", thus emphasising not only the organisational element of the entity transferred but also the element of pursuing an economic activity'. [39] It has inferred from this that, in order to interpret the condition relating to the preservation of the identity of an economic entity, within the meaning of the Directive, account ought to be taken of the two elements, as provided for in Article 1(1)(b) of the Directive, which, taken together, constitute that identity, and of the objective pursued by that directive, namely the protection of employees. [40]

69. Having regard to those considerations and in order not to frustrate in part the effectiveness of the Directive, the Court has held that the condition relating to the preservation of the identity of an economic entity ought to be interpreted not as requiring the retention of the specific organisation imposed by the undertaking on the various elements of production which are transferred, but as requiring the retention of the functional link of interdependence and complementarity between those elements. [41]

70. According to the Court, the retention of such a functional link between the various elements transferred allows the transferee to use them — even if they are integrated, after the transfer, in a new and different organisational structure — to pursue an identical or similar economic activity. [42]

71. In the light of the judgment in *Klarenberg*, [43] it is immaterial whether the entity taken over was absorbed into TAP's organisation, since a functional link was retained between, on the one hand, the assets and staff taken over and, on the other, the carrying on of the activity previously pursued by AIA.

72. In its judgment, the Supremo Tribunal de Justiça attached particular significance to the fact that the aircraft and staff taken over were used for scheduled and non-scheduled flights. In its view, that fact shows that an independent economic entity dedicated to the non-scheduled flights business was not retained within TAP.

36 — Paragraph 43.

37 — See, inter alia, judgments in *Allen and Others* (C-234/98, EU:C:1999:594, paragraph 27); *Mayeur* (C-175/99, EU:C:2000:505, paragraph 53); *Liikenne* (C-172/99, EU:C:2001:59, paragraph 34); and *Klarenberg* (C-466/07, EU:C:2009:85, paragraph 44).

38 — See, inter alia, judgments in *Mayeur* (C-175/99, EU:C:2000:505, paragraph 54); *Jouini and Others* (C-458/05, EU:C:2007:512, paragraph 36); and *Klarenberg* (C-466/07, EU:C:2009:85, paragraph 44).

39 — Judgment in *Klarenberg* (C-466/07, EU:C:2009:85, paragraph 45).

40 — Ibid. (paragraph 46).

41 — Ibid. (paragraph 47).

42 — Ibid. (paragraph 48).

43 — C-466/07, EU:C:2009:85.

73. In that connection, I take the view that it is immaterial that the assets transferred were used not only for non-scheduled flights but also for scheduled flights. The condition relating to the retention of the identity of the entity taken over does not require that the assets transferred be used exclusively for the purposes of the activity pursued. The functional link between those assets and the activity pursued continues to exist even if those assets are also used to carry on another activity, particularly where that other activity is an analogous activity within the air transport sector.

74. As the Commission submits, it follows from the judgment in *Klarenberg*[44] that the winding up of AIA and the integration of a significant proportion of its assets into the organisational structure of TAP, even though they did not retain an 'autonomous' identity, are not such as to preclude the application of the Directive. What matters is that the resources transferred must retain their identity and be used, after the transfer, in order to pursue an identical or analogous economic activity.

75. In the present case, AIA's assets were used initially (summer 1993 scheduling season) to pursue an activity identical to that of AIA, that is to say, the charter flights which AIA had contracted to operate, and later to pursue an activity which was identical (charter flights organised by TAP) or similar (scheduled TAP flights).

76. As the Court made clear in its judgment in *Klarenberg*,[45] the wording of the first and fourth subparagraphs of Article 6(1) of the Directive confirm that, in the mind of the EU legislature, that directive is intended to apply to any transfer satisfying the conditions laid down in Article 1(1) of that directive, whether or not the economic entity transferred retains its autonomy in the transferee's organisational structure.[46]

77. It is true that it is ultimately for the referring court to determine whether the criteria for the existence of a transfer of a business are met in the present case. In accordance with settled case-law, it is for the national court having jurisdiction to ascertain, in the context of a comprehensive assessment of all the facts characterising the transaction in question, whether the identity of the economic entity transferred was preserved.[47]

78. However, the particular context of the case in the main proceedings, which is the consequence of national courts adopting divergent positions, should, in my view, lead the Court to provide an answer to the referring court which is both more precise and more direct.

79. I therefore propose that the answer to the first question should be that Article 1(1) of the Directive must be interpreted as meaning that the concept of transfer of a business encompasses a situation in which an undertaking active on the charter flights market is wound up by decision of its majority shareholder, which is itself an undertaking active in the aviation sector and which, in the context of the winding up of the first undertaking:

— takes the place, in aircraft leasing contracts and ongoing charter flight contracts with tour operators, of the company being wound up;

— carries out activities previously pursued by the company being wound up;

— reinstates some workers hitherto seconded to the company being wound up and engages them to perform identical tasks; and

— takes over small items of equipment from the company being wound up.

44 — Idem.
45 — Idem.
46 — Paragraph 50.
47 — Paragraph 49.

B – *The second question*

80. By its second question, the referring court asks the Court, in essence, whether Article 267 TFEU must be interpreted as meaning that a national court or tribunal against whose decisions there is no judicial remedy under national law, such as the Supremo Tribunal de Justiça, was obliged, in the light of the facts set out in the first question and the fact that lower national courts adjudicating on the case had adopted contradictory decisions, to refer to the Court for a preliminary ruling the question of the correct interpretation of the concept of 'transfer of a business' within the meaning of Article 1(1) of the Directive.

81. It must be recalled, as a preliminary point, that the procedure established by Article 267 TFEU is an instrument of cooperation between the Court and the national courts by means of which the Court provides the national courts with the points of interpretation of EU law which they need in order to decide the disputes before them. [48]

82. In the context of that cooperation, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. [49]

83. The obligation to refer laid down by the third paragraph of Article 267 TFEU is thus an aspect of the cooperation, established with a view to ensuring the proper application and uniform interpretation of EU law in all the Member States, between national courts, in their capacity as courts responsible for the application of EU law, and the Court. [50]

84. It should be borne in mind that the obligation to refer a question to the Court for a preliminary ruling laid down by the third paragraph of Article 267 TFEU in respect of national courts or tribunals against whose decisions there is no judicial remedy is intended in particular to prevent a body of national case-law that is not in accordance with the rules of EU law from being established in a Member State. [51]

85. According to the Court, such an objective is secured where that obligation is incumbent, within the limits accepted by the Court in its judgment in *Cilfit and Others*, [52] upon supreme courts and any other national court or tribunal against whose decisions there is no judicial remedy. [53]

86. In so far as no appeal lies against the decisions of a national court or tribunal, such a court or tribunal is, in principle, obliged to make a reference to the Court of Justice under the third paragraph of Article 267 TFEU where a question relating to the interpretation of the TFEU is raised before it. [54]

48 — See, inter alia, judgments in *Schneider* (C-380/01, EU:C:2004:73, paragraph 20); *Stradasfalti* (C-228/05, EU:C:2006:578, paragraph 44); and *Kirtruna and Vigano* (C-313/07, EU:C:2008:574, paragraph 25).

49 — Judgments in *Schneider* (C-380/01, EU:C:2004:73, paragraph 21); *Längst* (C-165/03, EU:C:2005:412, paragraph 31); and *Kirtruna and Vigano* (C-313/07, EU:C:2008:574, paragraph 26).

50 — See, inter alia, judgment in *Intermodal Transports* (C-495/03, EU:C:2005:552, paragraph 38 and the case-law cited).

51 — Ibid. (paragraph 29 and the case-law cited).

52 — 283/81, EU:C:1982:335.

53 — See, inter alia, judgment in *Intermodal Transports* (C-495/03, EU:C:2005:552, paragraph 30 and the case-law cited).

54 — See judgment in *Consiglio nazionale dei geologi and Autorità garante della concorrenza e del mercato* (C-136/12, EU:C:2013:489, paragraph 25 and the case-law cited).

87. It follows from the relationship between the second and third paragraphs of Article 267 TFEU that the courts or tribunals referred to in the third paragraph have the same discretion as any other national court or tribunal to ascertain whether a decision on a question of EU law is necessary to enable them to give judgment. Accordingly, those courts or tribunals are not obliged to refer to the Court a question concerning the interpretation of EU law raised before them if that question is not relevant, that is to say, if the answer to that question, regardless of what it may be, can in no way affect the outcome of the case. [55]

88. On the other hand, if those courts or tribunals find that recourse to EU law is necessary to enable them to decide a case before them, Article 267 TFEU imposes, in principle, an obligation on them to refer to the Court any question of interpretation which may arise. [56]

89. Where there is a dispute that raises a question concerning the interpretation of EU law, the discharge by a national court or tribunal against whose decisions there is no judicial remedy under national law of its obligation to make a reference to the Court thus constitutes the rule, while a decision not to make a reference is the exception.

90. The judgment in *Cilfit and Others* [57] places on national courts and tribunals adjudicating at last instance an enhanced duty to state reasons where they refrain from referring questions to the Court.

91. Thus, with regard to the scope of the obligation laid down in the third paragraph of Article 267 TFEU, as delineated by the Court, it follows from well-established case-law, beginning with that judgment, that a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of EU law is raised before it, to comply with its obligation to make a reference, unless it has established that the question raised is irrelevant or that the provision of EU law in question has already been interpreted by the Court or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt. Whether such a possibility exists must be assessed in the light of the specific characteristics of EU law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the European Union. [58]

92. The Court has made it clear that, without prejudice to the lessons to be learned from the judgment in *Köbler*, [59] the case-law arising from the judgment in *Cilfit and Others* [60] gives the national court sole responsibility for determining whether the correct application of EU law is so obvious as to leave no scope for any reasonable doubt and for deciding, as a result, to refrain from referring to the Court a question concerning the interpretation of EU law which has been raised before it. [61]

93. In the context of the present reference for a preliminary ruling, the referring court asks the Court whether or not, taking into account its case-law on the concept of transfer of a business and in view of the divergent positions adopted by the national courts with regard to the interpretation to be adopted in the light of the facts of the present case, the Supremo Tribunal de Justiça was justified in not having 'any reasonable doubt' in relation to the question of interpretation raised, and could therefore refrain from making a reference to the Court for a preliminary ruling.

55 — Ibid. (paragraph 26 and the case-law cited).

56 — Ibid. (paragraph 27 and the case-law cited).

57 — 283/81, EU:C:1982:335.

58 — Judgment in *Intermodal Transports* (C-495/03, EU:C:2005:552, paragraph 33).

59 — C-224/01, EU:C:2003:513.

60 — 283/81, EU:C:1982:335.

61 — Judgment in *Intermodal Transports* (C-495/03, EU:C:2005:552, paragraph 37 and the case-law cited).

94. In this regard, it must be pointed out that national courts and tribunals against whose decisions there is no judicial remedy under national law must exercise particular caution before ruling out the existence of any reasonable doubt. They are required to set out the reasons why they are certain that EU law is being applied correctly.

95. That caution must prompt them, in particular, to make a precise check of whether their application of EU law takes due account of the specific characteristics of EU law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the European Union.

96. The Supremo Tribunal de Justiça took the view that the concepts contained in the Directive, and in particular the concept of transfer of a business, were sufficiently clear in terms of the interpretation given to them by the courts. In its opinion, this meant that there was no need in the present case to make a reference for a preliminary ruling.

97. That approach seems to me to be erroneous because it is well known that the concept of transfer of a business calls for a case-by-case interpretation. The cases which are successively brought before the Court allow it to refine the scope of that concept. The case-law in question is therefore constantly evolving. That peculiarity should have led the Supremo Tribunal de Justiça to exercise caution before deciding not to bring the matter before the Court.

98. That overconfidence in the consolidated nature of the Court's case-law on the concept of transfer of a business is compounded by a failure to take full account of that case-law, as a result of which the Supremo Tribunal de Justiça misinterpreted that concept.

99. In a situation such as that at issue in the main proceedings, in which the Court has established a body of case-law on the concept to be interpreted, a national court or tribunal which is in principle subject to an obligation to make a reference and which takes the view that the dispute brought before it raises a question concerning the interpretation of EU law has a choice between two approaches. Either it brings the matter before the Court with a view to obtaining further clarifications in the light of the dispute which it must resolve, or else it decides not to comply with its obligation to make a reference, in which event, however, it must accept and apply the answer previously given by the Court. If it does not take either of those two approaches and adopts an alternative interpretation of the EU law concept at issue, that court or tribunal commits an infringement of EU law which must be regarded as being sufficiently serious.[62] This follows from settled case-law to the effect that an infringement of EU law will be sufficiently serious where the decision concerned was made in manifest breach of the case-law of the Court in the matter.[63]

100. In short, if it had taken thorough and comprehensive account of the Court's case-law, including its most recent case-law, the Supremo Tribunal de Justiça would not have felt any certainty about its own application of EU law.

101. It is important that the Court adopt a strict position when it comes to reiterating the obligation to make a reference that is incumbent on national courts and tribunals against whose decision there is no judicial remedy under national law. As Advocate General Léger made clear in his Opinion in *Traghetti del Mediterraneo*,[64] and as the present case illustrates, '[f]ailure to comply with that obligation is likely

62 — See Pertek, J., 'Renvoi préjudiciel en interprétation', *JurisClasseur Europe Traité*, fascicule 361, 2010, § 97.

63 — See, inter alia, judgments in *Traghetti del Mediterraneo* (C-173/03, EU:C:2006:391, paragraph 43 and the case-law cited), and *Fuß* (C-429/09, EU:C:2010:717, paragraph 52 and the case-law cited).

64 — C-173/03, EU:C:2005:602.

to cause the court concerned to commit an error …, either an error in the interpretation of the [EU] law applicable, or an error regarding the consequences to be drawn from that law in order to ensure a consistent interpretation of national law or to assess whether that law is compatible with [EU] law'. [65]

102. Furthermore, I would point out that non-compliance on the part of national courts and tribunals against whose decisions there is no judicial remedy under national law with their obligation to make a reference has the effect of depriving the Court of the fundamental task assigned to it by the first subparagraph of Article 19(1) TEU, namely to ensure 'that in the interpretation and application of the Treaties the law is observed'.

103. Finally, it is apparent from the file that, in the present case, the Portuguese courts had arrived at divergent positions with respect to the interpretation of the concept of transfer of a business. It is my opinion that, while the existence of contradictory decisions given by national courts cannot in itself be sufficient to trigger the obligation to make a reference for a preliminary ruling laid down in the third paragraph of Article 267 TFEU, that circumstance is a contextual factor that reinforces the finding that the Supremo Tribunal de Justiça should have adopted a more cautious stance and made a reference to the Court for a preliminary ruling.

104. In my view, it follows from all of the foregoing considerations that the third paragraph of Article 267 TFEU must be interpreted as meaning that a national court or tribunal against whose decisions there is no judicial remedy under national law, such as the Supremo Tribunal de Justiça, was obliged, in circumstances such as those at issue in the main proceedings, to make a reference to the Court for a preliminary ruling.

C – *The third question*

105. By its third question, the referring court asks the Court, in essence, whether EU law, and in particular the case-law arising from the judgment in *Köbler*, [66] must be interpreted as meaning that it precludes a national State liability regime which makes the right to reparation conditional upon the prior setting aside of the decision which caused the loss or damage.

106. I would point out that, pursuant to Article 13(2) of the RRCEE, '[t]he claim for damages must be based on the prior setting aside of the decision that caused the loss or damage by the court having jurisdiction'.

107. In order to establish whether or not that condition is consistent with EU law, it should be borne in mind, first of all, that the principle of State liability for loss and damage caused to individuals as a result of infringements of EU law for which the State can be held responsible is inherent in the system of the Treaty. [67]

108. With regard to State liability as a result of an infringement of EU law attributable to a decision of a national court or tribunal adjudicating at last instance, the Court has made it clear that, having regard to the specific nature of the judicial function and to the legitimate requirements of legal certainty, State liability in such a case is not unlimited. As the Court has held, State liability can be incurred only in the exceptional case where the national court or tribunal adjudicating at last instance has manifestly infringed the applicable law. In order to determine whether that condition is satisfied, the national court hearing a claim for reparation must take account of all the factors which characterise the situation put before it, which include, in particular, the degree of clarity and precision

65 — Point 66.

66 — C-224/01, EU:C:2003:513.

67 — See, inter alia, judgment in *Ogieriakhi* (C-244/13, EU:C:2014:2068, paragraph 49 and the case-law cited).

of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by an EU institution and non-compliance by the court or tribunal in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 267 TFEU. [68]

109. As I have previously stated, such a manifest infringement of the applicable EU law is presumed, in any event, where the decision involved is made in manifest breach of the case-law of the Court on the subject. [69]

110. A right to obtain redress will therefore arise, if that condition relating to the manifest breach of the applicable EU law is met, where it has been established that the rule of law infringed is intended to confer rights on individuals and there is a direct causal link between the breach of the obligation incumbent on the State and the loss or damage sustained by the injured parties. Those three conditions are necessary and sufficient to found a right in favour of individuals to obtain redress, although this does not mean that the State cannot incur liability under less strict conditions on the basis of national law. [70]

111. The Court has also had occasion to make it clear that, subject to the right of reparation which flows directly from EU law, where those conditions are satisfied, it is on the basis of the rules of national law on liability that the State must make reparation for the consequences of the loss or damage caused, provided that the conditions for reparation of loss or damage laid down by national law are not less favourable than those relating to similar domestic claims (principle of equivalence) and are not so framed as to make it, in practice, impossible or excessively difficult to obtain reparation (principle of effectiveness). [71]

112. In my view, the procedural rule laid down in Article 13(2) of the RRCEE must be examined in the light of the principle of effectiveness. It is therefore necessary to determine whether such a procedural rule is capable of making it, in practice and in circumstances such as those at issue in the main proceedings, impossible or excessively difficult for the injured party to obtain reparation.

113. The crucial point here is to determine whether or not the injured party has a means of obtaining redress against a judgment of the Supremo Tribunal de Justiça which is prejudicial to him. When that question was put to it at the hearing, the Portuguese Government initially replied in the negative, before adding an unconvincing qualification to its reply. It will be for the referring court to determine the position in this regard under national law. Should that court arrive at the finding that the injured party has no means of obtaining redress against a judgment of the Supremo Tribunal de Justiça which is prejudicial to him, it would have to take the view that the procedural rule laid down in Article 13(2) of the RRCEE is contrary to the principle of effectiveness, in so far as it makes it impossible for that party to obtain reparation.

68 — See, inter alia, judgment in *Traghetti del Mediterraneo* (C-173/03, EU:C:2006:391, paragraph 32 and the case-law cited).

69 — Ibid. (paragraph 43 and the case-law cited). See also judgment in *Fuß* (C-429/09, EU:C:2010:717, paragraph 52 and the case-law cited).

70 — See, inter alia, judgment in *Traghetti del Mediterraneo* (C-173/03, EU:C:2006:391, paragraph 45 and the case-law cited).

71 — See, inter alia, judgment in *Fuß* (C-429/09, EU:C:2010:717, paragraph 62 and the case-law cited).

114. In any event, it seems apparent to me from the exchange of oral argument before the Court that, if such a means of obtaining redress against a judgment of the Supremo Tribunal de Justiça were to be identified, it would be largely theoretical and difficult to implement.[72] Consequently, in so far as the procedural rule laid down in Article 13(2) of the RRCEE would, in that event, constitute a serious obstacle impeding the injured party from obtaining reparation, it would, in my view, be contrary to the principle of effectiveness. After all, such a procedural rule would make it excessively difficult for the injured party in question to obtain reparation.

115. I therefore conclude that, in circumstances such as those at issue in the main proceedings, EU law, and in particular the case-law arising from the judgment in *Köbler*,[73] must be interpreted as meaning that it precludes a national State liability regime which makes the right to reparation conditional upon the prior setting aside of the decision which caused the loss or damage.

IV – **Conclusion**

116. In the light of the foregoing considerations, the questions referred by the Varas Cíveis de Lisboa should be answered as follows:

(1) Article 1(1) of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses must be interpreted as meaning that the concept of transfer of a business encompasses a situation in which an undertaking active on the charter flights market is wound up by decision of its majority shareholder, which is itself an undertaking active in the aviation sector and which, in the context of the winding up of the first undertaking:

— takes the place, in aircraft leasing contracts and ongoing charter flight contracts with tour operators, of the company being wound up;

— carries out activities previously pursued by the company being wound up;

— reinstates some workers hitherto seconded to the company being wound up and engages them to perform identical tasks; and

— takes over small items of equipment from the company being wound up.

(2) The third paragraph of Article 267 TFEU must be interpreted as meaning that a national court or tribunal against whose decisions there is no judicial remedy under national law, such as the Supremo Tribunal de Justiça (Supreme Court of Justice, Portugal), was obliged, in circumstances such as those at issue in the main proceedings, to make a reference to the Court of Justice for a preliminary ruling.

(3) In circumstances such as those at issue in the main proceedings, EU law, and in particular the case-law arising from the judgment in *Köbler* (C-224/01, EU:C:2003:513), must be interpreted as meaning that it precludes a national State liability regime which makes the right to reparation conditional upon the prior setting aside of the decision that caused the loss or damage.

72 — At the hearing, the Portuguese Government also stated that it had no knowledge of any cases where Article 696(f) of the new Portuguese Code of Civil Procedure had been implemented in a situation involving the incompatibility with EU law of a judgment delivered by the Supremo Tribunal de Justiça.

73 — C-224/01, EU:C:2003:513.