



Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 21 November 2018¹

Case C-563/17

**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,
with the intervention of:
PARPÚBLICA — Participações Públicas, SGPS, SA,
TAP, SGPS, SA**

(Request for a preliminary ruling from the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal))

(Reference for a preliminary ruling — Freedom of establishment — Air carrier —
Reprivatisation procedure — Conditions — Requirement to maintain the headquarters and effective
management — Public service obligations — Requirement to maintain the national hub)

1. The Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal) raises various questions with the Court of Justice concerning the compatibility with EU law of certain requirements included in the tender specifications for the privatisation of 'TAP – Transportes Aéreos Portugueses, S.A' ('TAP SA'), which took place in 2015.
2. Specifically, these relate to the requirement to maintain the company's headquarters and effective management in Portugal, the capacity to comply with public service obligations, and the commitment to maintain and develop the national hub.
3. In order to decide on the issues raised by the referring court, it will be necessary to determine, first, whether Directive 2006/123/EC² or Regulation (EC) No 1008/2008³ applies to the case. Then it will be necessary to consider whether the freedom that is potentially affected is the freedom of establishment, freedom of services or freedom of capital and, whichever it is, whether or not the requirements in the tender specifications respect that freedom.

¹ Original language: Spanish.

² Directive of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36).

³ Regulation 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).

I. Regulatory framework

A. EU law

1. Directive 2006/123

4. Recital 21 provides that ‘transport services, including urban transport, taxis and ambulances as well as port services, should be excluded from the scope of this Directive’.

5. According to Article 1(2), ‘[the directive] does not deal with the liberalisation of services of general economic interest, reserved to public or private entities, nor with the privatisation of public entities providing services’.

6. Article 2(2)(d) stipulates that the directive shall not apply to ‘services in the field of transport, including port services, falling within the scope of Title V of the Treaty’.

7. Chapter IV, entitled ‘Free movement of services’, contains provisions in Section 1 (‘Freedom to provide services and related derogations’) which guarantee the right of service providers to provide services in a Member State other than that in which they are established (Article 16) but which also set out certain derogations from that right (Article 17).

2. Regulation No 1008/2008

8. Recitals 10 to 12 are as follows:

‘(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.’

9. Article 2 includes the following definitions:

‘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.’
10. Article 4 stipulates as follows:

‘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;

...’

11. Article 8 provides that:

‘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.

...’

12. Article 15 stipulates that:

‘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.

...

4. When operating intra-Community air services, a Community air carrier shall be permitted to combine air services and to enter into code share arrangements, without prejudice to the Community competition rules applicable to undertakings.

Any restrictions on the freedom of Community air carriers to operate intra-Community air services arising from bilateral agreements between Member States are hereby superseded.

5. Notwithstanding the provisions of bilateral agreements between Member States, and subject to the Community competition rules applicable to undertakings, Community air carriers shall be permitted by the Member State(s) concerned to combine air services and to enter into code share arrangements with any air carrier on air services to, from or via any airport in their territory from or to any point(s) in third countries.

...’

13. Article 16 is as follows:

‘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.

...’

B. National law

14. Under Decree-law No 181/-A/2014 of 24 December 2014,⁴ the Portuguese Government approved the process for the indirect reprivatization of the share capital of TAP SA through what it terms a *reference direct sale* (a direct sale to key long-term investors) of up to 61% of the shares in TAP — Transportes Aéreos Portugueses, SGPS, SA (‘TAP SGPS’) and an offer to sell up to 5% of the share capital of TAP SGPS to its employees. In addition, a put option was included in favour of the State, enabling it to transfer the remaining capital of TAP SGPS to the purchaser in the reference direct sale; the State may also agree a call option with the purchaser, in accordance with the terms of the specifications for the transaction.

15. In Resolution No 4-A/2015 of 15 January 2015,⁵ the Council of Ministers approved the tender specifications for the reference direct sale of shares representing up to 61% of the share capital of TAP SGPS.

⁴ *Diário da República*, series I, No 248 of 24 December 2014.

⁵ *Diário da República*, series I, No 13 of 20 January 2015.

16. Article 1 of the tender specifications reads as follows:

- ‘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 SA].
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 shares referred to in the preceding paragraph shall be agreed with one or more tenderers which 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), S.A. [“Parpública”].’

17. Article 5 of the tender specifications lists the following ‘selection criteria’:

- ‘(a) The contribution to strengthening the economic and financial capacity of [TAP SGPS], of [TAP SA] and of their capital structure, in particular the quality of the capitalisation plan and its implementation through new assets and resources as far as the tenderer is concerned, and the conditions associated with making those assets and resources available in such a way as to contribute to the sustainability and enhancement of the companies, and to the growth of their activities, and to preserve the relative weight and value of the remaining capital held by the State and the value of the put option.
- (b) The amount offered to purchase the shares in the capital of [TAP SGPS] covered by the reference direct sale, in particular, the price per share, the overall cash inflow, the quality and value of the methods and formulae for increasing the put and call options and, generally, the possibility of finalising the direct sale within a deadline, the conditions for payment and other appropriate terms for safeguarding the property interests of the State.
- (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 SA] whilst achieving the objectives defined by the Government for the reprivatisation process; promoting the enhancement of its competitive position as a global air-transport 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 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 SA], 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.

- (f) The absence of any legal or economic and financial constraints preventing the tenderer from completing the reference direct sale, in particular the minimisation of conflicts of interest between the tenderer's activities and those of the TAP Group, and the mitigation of risks to the property interests of the State and to the pursuit of the objectives of the criteria in the paragraphs above.
- (g) Relevant technical and management experience in the aviation sector, the financial standing and capacity of the tenderer, and any guarantees provided in compliance with the criteria in the paragraphs above.
- (h) Commitments to employment stability, in particular being expressly bound, in accordance with the law and the constitution, to comply with the agreement between the Government, the trade unions and [TAP SGPS], and to respect all collective agreements in force.
- (i) The contribution to strengthening the shareholding structure and stability of [TAP SGPS] and [TAP SA], in particular by implementing a model of corporate governance which takes into account the specific nature of [TAP SGPS], the activity carried on by [TAP SA] and the objectives defined by the Government for the reprivatisation process.'

II. Facts

18. The 'Associação Peço a Palavra' ('I Want to be Heard Association') and others filed an administrative appeal with the Supremo Tribunal Administrativo (Supreme Administrative Court), seeking the annulment of the tender specifications approved by Resolution No 4-A/2015 of the Council of Ministers of 15 January 2015.

19. The applicants maintain that Article 5(c) of those specifications is contrary to Articles 49 and 54 TFEU, because it requires the headquarters and effective management of the TAP Group to be maintained. In addition, in their opinion, Article 5(d) and (e) of the specifications are in breach of Articles 56 and 57 TFEU and Articles 16 and 17 of Directive 2006/123, because they impose requirements to comply with public service obligations and to maintain and develop the current national hub.

III. Questions referred

20. In this context, the Supremo Tribunal Administrativo (Supreme Administrative Court) has referred the following questions 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 tenders?
- (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 tenders?

- (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 tenders?
- (4) As regards the activity carried out 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/EC 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 question 4 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 tenders?
- (6) If the answer to question 4 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 tenders?

IV. Proceedings before the Court of Justice and positions of the parties

21. The request for a preliminary ruling was lodged with the Court of Justice on 25 September 2017. Written observations were submitted by Parpública, the Portuguese, Italian and Dutch Governments and the Commission, and those parties also appeared in the public hearing held on 13 September 2018.

22. Parpública argues that the answer to question 1 should be that the provisions are not contrary to EU law. In its opinion, the disputed requirements do not limit or restrict freedom of establishment and, if they were to do so, the restriction would be justified. With regard to questions 2 and 3, it maintains that Articles 56 and 57 TFEU do not apply to air transport services, by virtue of Article 58(1), Article 90 and Article 100(2) TFEU. On question 4, it argues that TAP's activities cannot be considered a service that is subject to Directive 2006/123, in view of the exception in Article 2(2)(d). There is therefore no need to answer questions 5 and 6.

23. According to the Portuguese Government, the condition at issue in question 1 derives from the arrangements for granting operating licences set out in Regulation No 1008/2008 and does not entail a restriction on freedom of establishment, because it does not apply to potential investors. With regard to questions 2 and 3, it agrees with Parpública and argues that, in any event, the selection criteria are not contrary to secondary law on air transport services. It also endorses Parpública's position on questions 4, 5 and 6, adding that Regulation No 1008/2008 applies.

24. According to the Italian Government, the first three questions need to be answered together, and Articles 49, 54, 56 and 57 TFEU do not prevent the imposition of conditions such as those at issue in the reprivatisation process. The contested conditions are not requirements that restrict freedom of establishment or freedom of services, and, if they were, they would still be justified on grounds of overriding public interest.

25. The Italian Government agrees with Parpública and the Portuguese Government on questions 4, 5 and 6, arguing that Directive 2006/123 does not apply to this case — although it bases its assertion on Article 1(2) of the directive, rather than on Article 2(2)(d). In the alternative, it argues that, as the privatisation process does not affect the capital of the air carrier but of the company that controls the air carrier, one would have to examine whether the controlling company's services come within the scope of Directive 2006/123. In its opinion they do not, because they are 'investments' within the meaning of the exception in Article 2(2)(b) of the directive. If they were transport activities, then the provision in Article 2(2)(d) would apply.

26. With regard to question 1, the Dutch Government considers that the conditions at issue restrict freedom of establishment, but that they could be justified. On question 2, it agrees with Parpública and the Portuguese Government that Articles 56 and 57 TFEU do not apply. With regard to questions 4, 5 and 6, it also considers that Directive 2006/123 does not apply, by virtue of Article 2(2)(d).

27. The Commission proposes that question 1 be answered to the effect that Article 49 TFEU does not prevent the conditions at issue in the case, provided that, under bilateral agreements between Portugal and certain third-party States, the retention of the company's traffic rights is conditional on the company's headquarters and principal activity remaining in Portugal.

28. With regard to question 2, the Commission states that the requirement could be admissible under Articles 16, 17 and 18 of Regulation No 1008/2008. On question 3, it believes that the requirement to maintain and develop the national hub could be justified on grounds of overriding public interest but not on grounds of contributing to the growth of the national economy. With regard to questions 4, 5 and 6, it considers that Directive 2006/123 does not apply, based either on Article 2(2)(d) — if the case concerns transport — or on Article 5(4), if it relates to public contracts.

V. Analysis

29. The Supremo Tribunal Administrativo (Supreme Administrative Court) has to determine whether three of the requirements in the tender specifications approved by the Portuguese Government in the procedure for reprivatising the air carrier TAP are compatible with EU law.⁶

30. As a preliminary point, it should be clarified that, as far as the present case is concerned, in practice the case involves 'requirements' or 'conditions', even though these formally appear in the tender specifications under the heading of 'Selection criteria'.

31. During the hearing, Parpública insisted that the referring court was mistaken in classifying what were merely 'selection criteria' as requirements concerning tenderers' suitability. In its opinion, this error had 'contaminated' the remainder of the reference for a preliminary ruling.

⁶ As a general rule, the referring court uses the word 'reprivatisation', although at times it refers to 'privatisation' (as in paragraph 1.1 and point III of paragraph 3.1 of the order for reference). The difference in terminology is, however, irrelevant for present purposes, as was acknowledged at the hearing.

32. In my opinion, we should follow the legal classification used by the referring court, which explicitly and repeatedly uses the term ‘requirements’⁷ to refer to the conditions included as ‘criteria’ in the tender specifications. While it would be possible to debate whether or not the referring court’s classification is correct, this issue could only be considered from the perspective of national law, and this is not a matter for the Court of Justice, which must accept the terms of the order for reference as regards the factual and legal situation that delimits the subject matter of the original proceedings.

33. Having said that, the response to the request for a preliminary ruling would be no different if one were to accept that the tender specifications contained genuine selection criteria, because it is also possible to examine whether such criteria comply with EU law, as is customary in judgments of the Court of Justice on tender specifications in public procurement cases.

34. In the final analysis, regardless of whether they were selection criteria or genuine requirements, ultimately their content would have binding force in the privatisation process, meaning that the purchaser of the shares would have to comply with the demands in question when they were included in the share purchase agreement.

35. It should be recalled that the three requirements at issue entailed obligations: (a) to keep the company’s headquarters and effective management in Portugal; (b) to comply with the public service obligations; and (c) to maintain and develop the current national hub.

36. Reversing the order proposed by the referring court, and in line with the views of many of the parties, it is preferable to address question 4 first. The answer to this question will determine whether the substantive issue should be resolved by applying Directive 2006/123 or in accordance with other provisions of EU law.

A. Applicability of Directive 2006/123 (questions 4, 5 and 6)

37. According to the referring court, its queries concerning the applicability of Directive 2006/123 relate to the fact that the reprivatisation of TAP affects the capital of a company engaged in air transport. In its opinion, in view of the activity involved, the exception in Article 2(2)(d) of Directive 2006/123 may apply, as the directive does not apply to ‘services in the field of transport’.

38. Virtually all the parties agree that Directive 2006/123 does not apply, because the case concerns the privatisation of an airline, and therefore the exception in Article 2(2)(d) of the directive applies.

39. However, the Italian Government argues that the reason why Directive 2006/123 does not apply is because of the exception in Article 1(2), which establishes that the directive does not deal with ‘the privatisation of public entities providing services’.⁸

40. I agree with this view.⁹ In effect, the case involves the privatisation of a company that was until that point a public entity, and therefore this fact alone is enough to rule out the applicability of Directive 2006/123, whatever the services provided by the privatised entity.

41. As an additional argument, if one looks at the nature of the activities carried out by TAP SA, that is, by the company whose shares are held by the entity whose capital is being reprivatised (TAP SPGS), one will see that the exception in Article 2(2)(d) of Directive 2006/123 also applies.

⁷ Thus question 1 refers to the ‘*requirement* to keep the headquarters and effective management’. Questions 2 and 5 refer to ‘the *requirement* to comply with the public service obligations’, while questions 3 and 6 talk of ‘the *requirement* to maintain and develop the current national hub’ (italics added).

⁸ Paragraph 6 of the written observations of the Italian Government.

⁹ Which also appears to be shared by the referring court, according to its statements in points XXXII and XXXIII of paragraph 3.4 of the order for reference.

42. As noted by the Court of Justice in *Grupo Itevelesa and Others*,¹⁰ ‘it is apparent from the documents preparatory to the adoption of the Services Directive that the exclusion relating to “services in the field of transport” was intentionally drafted in terms designed to correspond to the wording of Article 51 EC, now Article 58 TFEU, paragraph 1 of which states that the “freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport”’.

43. For the Court of Justice, ‘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’.¹¹ Given such a broad definition, the activities carried on by TAP SA can easily be included within that concept and, by a logical connection, so too can those of TAP SPGS. The latter is simply a holding company for the shares in TAP SA, the reprivatisation of which constitutes the subject matter of the proceedings.

44. Directive 2006/123 is therefore doubly inapplicable in this case, meaning that there is no need to answer questions 5 and 6. In any event, in my opinion the grounds in Article 1(2) of the directive should take precedence, because they refer to a logically prior situation, in that while Article 2 of Directive 2006/123 addresses the *scope* of the directive, Article 1 delimits its *regulatory subject matter*, outside of which the directive does not apply. There is, therefore, no need to exempt from application something which, by definition, could not apply.

B. The freedom affected in the main proceedings

45. The privatisation of an airline involves transferring part of the company’s share capital, which had until then been in public hands, to (private) investors who acquire the relevant shares. The privatising effect of the share sale takes precedence over the substantive activities of the privatised entity. The issue therefore falls within the scope of Article 345 TFEU, which sets out the principle of the neutrality of the Treaties with regard to the system of property ownership in Member States.

46. However, that article ‘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, which rules include, *inter alia*, the prohibition of discrimination, freedom of establishment and the free movement of capital’.¹²

47. Having regard to the requirements in the tender specifications at issue, I consider that the freedom involved is the freedom of establishment, rather than the free movement of capital or freedom to provide services.

48. Thus, the sale of shares representing up to 61% of the share capital of TAP SGPS would enable the acquirer to exercise genuine influence over the management of that company and of the subsidiary (TAP SA). According to the case-law of the Court of Justice, this factor is decisive in determining that the freedom exercised is the freedom of establishment.¹³

¹⁰ Judgment of 15 October 2015 (C-168/14, EU:C:2015:685), paragraph 44.

¹¹ Judgment of 20 December 2017, *Asociación Profesional Élite Taxi* (C-434/15, EU:C:2017:981), paragraph 41.

¹² 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.

¹³ In the words of the judgment of 13 April 2000, *Baars* (C-251/98, EU:C:2000:205), paragraph 22, ‘a national of a Member State who has a holding in the capital of a company established in another Member State which gives him definite influence over the company’s decisions and allows him to determine its activities is exercising his right of establishment.’ See, in the same vein, the judgments of 13 November 2012, *Test Claimants in the FII Group Litigation* (C-35/11, EU:C:2012:707), paragraph 91, and of 10 June 2015, *X* (C-686/13, EU:C:2015:375), paragraph 18. By contrast, according to the judgment of 7 September 2017, *Egiom and Enka* (C-6/16, EU:C:2017:641), paragraph 41, ‘national provisions which apply to shareholdings acquired solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking must be examined exclusively in light of the free movement of capital’. See also the judgment of 20 December 2017, *Deister Holding and Juhler Holding* (C-504/16 and C-613/16, EU:C:2017:1009), paragraph 78.

49. As detailed in the order for reference,¹⁴ shortly after concluding the sale agreement with the selected company, the Portuguese Government¹⁵ opened a negotiating process to reconfigure the terms and conditions of the State's holding in TAP SGPS. On completion of those negotiations, the acquiring company agreed to sell Parpública the shares it needed in order to hold 50% of the share capital in TAP SGPS.

50. According to this (new) state of affairs, while the capital held by the company that was selected in the reprivatisation process is still substantial, it no longer guarantees that the company will be able to exercise decisive influence over the management of TAP SGPS, as would have been the case had it continued to hold 61% of the company's share capital.¹⁶ However, the criterion adopted in the case-law cited above is not that of a determining or decisive influence, but that of 'definite influence', that is, influence that can be used to play an active part in the management of the company, which, in my view, can be achieved with 45% of the share capital.¹⁷

51. In any event, the Court of Justice must restrict itself to the issues raised by the referring court in its questions, that is, the original conditions of the reprivatisation procedure. Without having recourse to any reasons other than the presumption of relevance which the Court of Justice ascribes to references for a preliminary ruling,¹⁸ let us simply note that the feasibility of the operation to reacquire the share capital of TAP SGPS by Parpública could, in turn, be determined by the validity of the initial privatisation procedure. It still makes sense, therefore, to respond to the questions raised in the context of a process which privatised 61% of the share capital in the previously State-owned company and which was, consequently, sufficient to confer on the acquirer of the shares an influence that was not only *definite*, but also, in fact, *decisive*.

52. In determining whether the clauses in the tender specifications are compatible with EU law, the relevant provisions are, therefore, Articles 49 and 54 TFEU. On this basis, questions 1, 2 and 3 should be reformulated so that each of the selection criteria referred to in the questions is compared against those provisions of the TFEU.

53. Regard must also be had to Regulation No 1008/2008 (which includes the 'appropriate provisions for air ... transport' established by the European Parliament and the Council under the power provided for in Article 100(2) TFEU), in that some of the harmonising provisions it contains on the regulation of air services have an impact on this case.¹⁹

C. The restrictive nature of the conditions, in the light of freedom of establishment

54. In my opinion, the three criteria referred to in the order for reference include in themselves a restriction on the freedom of establishment. It should be recalled that, for the Court of Justice, 'all measures which prohibit, impede or render less attractive the exercise of the freedom of establishment must be considered to be restrictions on that freedom'.²⁰

¹⁴ Paragraph 3.1 VII of the order for reference.

¹⁵ The resolution of the Council of Ministers (91-A/2015) that brought the privatisation process to an end is dated 12 November 2015. The new executive, which came to power on 26 November of that year and is of a different political persuasion, immediately began negotiations to *reconfigure* the process.

¹⁶ At the hearing, Parpública acknowledged that the Portuguese State, which now holds the majority of the airline's share capital, retains all the voting rights attached to its majority shareholding.

¹⁷ The Portuguese State owns 50% of the share capital and TAP's employees own the remaining 5%.

¹⁸ See, amongst many others, the judgments of 10 December 2002, *British American Tobacco (Investments) and Imperial Tobacco* (C-491/01, EU:C:2002:741), paragraph 35; of 5 July 2016, *Ognyanov* (C-614/14, EU:C:2016:514), paragraph 19; of 15 November 2016, *Ullens de Schooten* (C-268/15, EU:C:2016:874), paragraph 54; and of 28 March 2017, *Rosneft* (C-72/15, EU:C:2017:236), paragraphs 50 and 155.

¹⁹ If the rules were completely harmonised, the general provisions in the TFEU concerning freedom to provide services would not apply, and national legislation would have to be assessed in the light of the harmonising provisions rather than the primary law, in accordance with the case-law of the Court of Justice as laid down in the judgment of 17 November 2015, *RegioPost* (C-115/14, EU:C:2015:760), paragraph 57, *inter alia*.

²⁰ See, for example, the judgment of 8 March 2017, *Euro Park Service* (C-14/16, EU:C:2017:177), paragraph 59.

55. There can be general agreement that the conditions imposed on the privatisation process by the Portuguese Government do not go so far as to prohibit the exercise of that freedom; nor do they impede it so much that they prevent it. But, at the very least, they make it less attractive.

56. Those conditions are not minor restrictions. They mean that whoever acquires up to 61% of the share capital of TAP SGPS will be prevented from having a free hand in managing the airline in accordance with its own economic interests, because it will still have to comply with the provision of public service obligations, and it will not be able to relocate its headquarters or effective management, or to do away with the current hub.

57. Although the Italian Government makes a point of stressing the differences with the restrictions resulting from the exercise of the special rights attached to so-called ‘golden shares’,²¹ it seems to me that there are marked similarities between those special rights and the conditions at issue here.

58. The ‘golden shares’ which a Member State retained for itself during the process of privatising previously State-owned companies, on which the Court of Justice has had to rule in the past,²² conferred on the holder ‘an influence on the management of [the company] which is not justified by the size of its shareholding in that company [and which] is liable to discourage operators from other Member States from making direct investments in [the company] since they could not be involved in the management and control of that company in proportion to the value of their shareholdings’.²³ In short, they involved ‘the risk that the [Member] State might exercise its special rights in order to pursue interests which do not coincide with the economic interests of the company concerned’, which would be a disincentive.²⁴

59. The conditions with which we are currently concerned do not simply entail a risk that ‘decisions recommended by the organs of [the company] as being in the economic interests of the latter’²⁵ may be blocked by the Portuguese Government: they also entail the materialisation of that possibility. The organs of the privatised company could not even *recommend* decisions such as the transfer of the headquarters and effective management, which would already have been ruled out as the result of an unavoidable condition imposed on the company’s new owner.

60. Both Parpública²⁶ and the Portuguese Government²⁷ defend the selection criterion of maintaining the company’s headquarters in Portugal, invoking the *Yellow Cab Verkehrsbetrieb* judgment,²⁸ which held that ‘the requirement of a seat or another establishment in the territory of the host Member State cannot logically constitute, as such, a barrier to, or restriction on, the freedom of establishment’, since ‘that obligation does 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’.²⁹

21 Paragraphs 17 and 18 of its written observations.

22 Judgments of 4 June 2002, *Commission v Portugal* (C-367/98, EU:C:2002:326), *Commission v France* (C-483/99, EU:C:2002:327) and *Commission v Belgium* (C-503/99, EU:C:2002:328); of 13 May 2003, *Commission v Spain* (C-463/00, EU:C:2003:272) and *Commission v United Kingdom* (C-98/01, EU:C:2003:273); of 6 December 2007, *Federconsumatori and Others* (C-463/04 and C-464/04, EU:C:2007:752); of 28 September 2006, *Commission v Netherlands* (C-282/04 and C-283/04, EU:C:2006:608); of 23 October 2007, *Commission v Germany* (C-112/05, EU:C:2007:623); of 26 March 2009, *Commission v Italy* (C-326/07, EU:C:2009:193); of 8 July 2010, *Commission v Portugal* (C-171/08, EU:C:2010:412); of 11 November 2010, *Commission v Portugal* (C-543/08, EU:C:2010:669); and of 10 November 2011, *Commission v Portugal* (C-212/09, EU:C:2011:717).

23 Judgment of 8 July 2010, *Commission v Portugal* (C-171/08, EU:C:2010:412), paragraph 60.

24 Judgment of 28 September 2006, *Commission v Netherlands* (C-282/04 and C-283/04, EU:C:2006:608), paragraph 29.

25 Judgment of 28 September 2006, *Commission v Netherlands* (C-282/04 and C-283/04, EU:C:2006:608), paragraph 30.

26 Paragraph 81 of its written observations.

27 Paragraphs 63 and 64 of its written observations.

28 Judgment of 22 December 2010, C-338/09, EU:C:2010:814.

29 *Ibidem*, paragraph 34.

61. In that case, the requirement at issue was to have a seat or another establishment in the territory of a Member State in order to obtain authorisation to operate a public urban bus service. While that requirement was not *in itself* contrary to freedom of establishment, the timing of the requirement (which had to be satisfied before authorisation was granted) did, however, render it incompatible with that freedom.³⁰

62. By contrast, the present case does not simply involve a requirement to have *a* seat or permanent establishment in Portugal, but to maintain *the* main seat and effective management of the company in the territory of that Member State.

63. For the Court of Justice, freedom of establishment encompasses ‘the right of a company or firm formed in accordance with the legislation of a Member State to convert itself into a company or firm governed by the law of another Member State ..., provided that the conditions laid down by the legislation of that other Member State are satisfied’.³¹ Therefore, in my view, the obligation for the company’s headquarters to remain in Portugal also involves a restriction on freedom of establishment.

64. The same can be said of the requirement to accept obligations under public law and the requirement to maintain the privatised company’s hub in Portugal. Both requirements may dissuade a potential purchaser from acquiring the majority of the company’s share capital, because to a large extent they predetermine subsequent business decisions.

65. Based on this premiss, we have to examine whether the conditions at issue can be justified under EU law, and whether they are appropriate for achieving the objective that may provide justification for them, and are not disproportionate for that purpose.

66. In this regard, I share the view of the Netherland’s Government,³² which argues that the condition that requires compliance with public service obligations should be examined first. The reason for this, with which I agree, is that the condition concerning maintenance of the company’s headquarters and effective management in Portugal may be connected to that requirement, of which it could in practice constitute an extension.

D. Compliance with public service obligations (second question referred)

67. Under Article 5(d) of the tender specifications, the selection criteria include ‘the capacity to ensure proper compliance, in good time, with the public service obligations of [TAP SA], 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’.

³⁰ Judgment of 22 December 2010, *Yellow Cab Verkehrsbetrieb* (C-338/09, EU:C:2010:814), paragraph 37: ‘requiring an economic operator, established in another Member State and wishing to obtain authorisation to operate a regular bus service in the host Member State, to hold a seat or another establishment in the territory of that State even before authorisation has been granted to operate that service has a dissuasive effect. An economic operator exercising ordinary care would not be willing to make investments, which may well be significant, if completely unsure whether such authorisation will be granted or not’.

³¹ Judgment of 25 October 2017, *Polbud — Wykonawstwo* (C-106/16, EU:C:2017:804), paragraph 33, citing the judgment of 27 September 1988, *Daily Mail and General Trust* (81/87, EU:C:1988:456), paragraph 17. More references are to be found in paragraph 35 of the judgment of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785), which noted that ‘even though, according to their wording, the Treaty provisions on freedom of establishment are aimed at ensuring that foreign nationals are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation’.

³² Paragraph 25 of the written observations of the Netherland’s Government.

68. As I have already noted, the restriction on freedom of establishment arises from the fact that this clause imposes certain conditions on the purchaser of 61% of the reprivatized share capital that could, in principle, deter it from making the purchase, because they restrict its capacity for independent action as a business.

69. There is settled case-law of the Court of Justice to the effect that the guarantee of a service of general interest may constitute an overriding reason that is capable of justifying an obstacle to the freedoms guaranteed by the Treaties.³³

70. In my view, ensuring an air service within the terms of Article 5(d) of the tender specifications — which place particular emphasis on the connections with the Portuguese autonomous regions, that is, with outermost regions within the meaning of Article 349 TFEU —³⁴ represents a general interest reason that is sufficient to justify the restriction on freedom of establishment.

71. The Commission has focused its arguments on whether TAP SA is *actually* conditioned by public service obligations and whether these have been set in accordance with Article 16 of Regulation No 1008/2008. It states that if they have not, they would be incompatible with that regulation.³⁵

72. In the same vein, the Netherlands Government ‘deduces’ that TAP SA is subject to a public service obligation that was assigned on the basis of Article 16 of Regulation No 1008/2008.³⁶ Parpública refers more specifically to the public service obligations that applied to TAP SA on 20 January 2015, that is, on the date of the official publication of the tender specifications.³⁷

73. Under this approach by the parties, the debate centres on the question of the public service obligations that *apply* to TAP SA, and it is taken for granted that those obligations already exist (Netherlands Government), or it is argued that they are effectively in force (Parpública) or that there is only partial information available regarding their existence (Commission).³⁸

74. In my opinion, this focus diverts attention from the fundamental issue that underlies the origins of the reference and that is the issue in the actual question posed by the referring court.

75. It is helpful to return to the exact wording of the condition in Article 5(d) of the tender specifications. Literally, this refers, using the subjunctive, to ‘the capacity to ensure proper compliance, in good time, with any public service obligations that *may apply* to [TAP SA]’.³⁹ It does not refer to obligations that *apply* to the company — that is, to obligations that actually affect it — but to those that *may apply* to it — that is, those that may potentially affect it.

33 This has been held in respect of a universal postal service (judgment of 28 September 2006, *Commission v Netherlands*, C-282/04 and C-283/04, EU:C:2006:608, paragraph 38) and with regard to regular maritime transport services to, from or between islands (judgment of 20 February 2001, *Analir and Others*, C-205/99, EU:C:2001:107, paragraph 27).

34 Territories that are particularly affected by the declaration of principles set out in Article 1 of Protocol No 26 included as an annex to the TFEU, in the sense that the shared values of the Union in respect of services of general economic interest within the meaning of Article 14 TFEU include in particular, inter alia, ‘the diversity between various [such] services and the differences in the needs ... of users that may result from different geographical ... situations’.

35 Paragraph 71 of its written observations.

36 Paragraphs 26 and 27 of its written observations. The ‘deduction’ is based on two communications from the Commission issued pursuant to Regulation (EEC) No 2408/92, which is the predecessor of Regulation No 1008/2008: the first of these communications concerns the imposition of public service obligations on scheduled air services within Portugal (OJ 1995 C 200, p. 3); and the second concerns the amendment of public service obligations imposed on certain scheduled air services within Portugal (OJ 2004 C 248, p. 6).

37 Paragraph 107 of the written observations of Parpública, which refer to the Commission communication of 20 October 2010 pursuant to Article 16(4) of Regulation No 1008/2008 on public service obligations in respect of scheduled air services (OJ 2010 C 283, p. 14).

38 At the hearing it was stated that TAP has not operated any route covered by a public service obligation since 28 March 2015. From that date, a system of mobility contributions, levied on tickets issued by any company that covers certain routes, has applied.

39 Italics added. In the original Portuguese: ‘obrigações de serviço público que incumbam à TAP, SA’.

76. The selection criterion, therefore, is not the capacity to *continue to ensure* compliance with the public service obligations that already apply to TAP SA (whatever those may be), but to assume whatever obligations may be imposed after the tenderer selected in the reprivatisation process has purchased part of the company's share capital.

77. It is true that Article 5(d) of the tender specifications also specifically refers to '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 ...'. It is thus referring to services that TAP SA would already be required to provide under Article 16 of Regulation No 1008/2008. But, in addition to the fact that there is no express reference to that existing obligation, I believe that the clause is addressing a potential obligation, in that it refers to connections with the autonomous regions 'where applicable'.⁴⁰

78. If this interpretation were considered to be overly literal or formalistic, and one wanted to conclude that the aim of the tender conditions is to ensure compliance with the public service obligations by which TAP SA is *already* bound, one has to address the unavoidable fact that the referring court refers in its question to 'the requirement to comply with the public service obligations on the part of the purchasing entity'. There is therefore no mention of the capacity of the purchasing entity to assume the specific public service obligations that encumber the purchased entity.

79. It is possible that 'the obligations' addressed in this part of the order for reference are the obligations that already apply to TAP SA. But — and, in my opinion, this is the important point — the referring court does not specifically ask about those obligations (which, as noted above, appear to have ceased to exist in 2015), nor does it ask whether they were imposed on TAP SA in accordance with Regulation No 1008/2008 or whether, if they were not, it was nevertheless possible for the selection criteria to include a requirement for a guarantee that the obligations would be satisfied. Its question is strictly limited to whether the requirement to have the capacity to comply with public service obligations can constitute a selection criterion that is compatible with EU law.

80. Given those terms, which are notably abstract, the answer should disregard the specific public service obligations that applied to TAP at the point when it was privatised. I reiterate that the referring court does not raise any questions about that issue. Moreover, it is for the referring court to determine whether or not those obligations were imposed lawfully (and, if they were not, what the consequences are). That would be the position, of course, if an application for a declaration of nullity had been founded on this particular issue in the main proceedings, which does not seem to have been the case.

81. Therefore, to require the purchasing entity to be capable of taking on public service obligations for the flight connections between the main national airports and the airports of the autonomous regions represents a requirement which, although a restriction on freedom of establishment, is justified because it addresses an overriding reason relating to the public interest. In short, it is that reason that provides the foundation for the very legitimacy of the imposition of that type of obligation, which is explicitly endorsed by Article 16 of Regulation No 1008/2008.

82. Consequently, the requirement in question is not only justified: it is relevant and appropriate, because it ensures compliance with the public service obligations that may be imposed on the privatised company, without going beyond what is reasonably required to achieve that objective.

⁴⁰ In this vein, the provision ends by referring, literally, to 'the continuation and further development of the routes *that may serve* the autonomous regions, the diaspora and Portuguese-speaking countries and communities'. Once again, the language contains an element of possibility and, in any event, it refers to flight connections other than those provided for in Article 16 of Regulation No 1008/2008.

E. The requirement to keep the headquarters and effective management of the airline in Portugal (first question referred)

83. Under Article 5(c) of the tender specifications, the selection criteria include ‘the submission of and performance guarantee for an adequate and coherent strategic plan’ designed to preserve and promote the growth of TAP SA and to maintain its integrity, identity and independence. Emphasis is placed on the need to preserve ‘the TAP mark and its association with Portugal’ and to keep its headquarters and effective management in that Member State.

84. For the Netherland’s Government, sufficient justification for this requirement may be found in the fact that it is designed to ensure compliance with the public service obligations imposed (or which may subsequently be imposed) on the purchasing company.⁴¹ However, I am not entirely convinced by its arguments.

85. Indeed, the case-law does not generally support this type of imposition concerning head offices because, as a general rule, less restrictive measures are possible.⁴² And if the public service obligations provided for in Article 16 of Regulation No 1008/2008 (that is, only intra-Community connections) are imposed directly on the routes, whichever company is covering them, the argument set out above would mean that any company that wanted to cover those routes would have to have its headquarters in Portugal, which seems to me to be excessive.

86. Moreover, one of the requirements in Article 5(d) of the tender specifications (the guarantee for ‘the continuation and further development of the routes serving the ... diaspora and Portuguese-speaking countries and communities’), cannot per se be considered a public service obligation within the meaning of the aforementioned Article 16 of Regulation No 1008/2008.

87. However, as the Commission has pointed out, it is common practice in the air transport sector to include a nationality requirement in bilateral agreements concluded with third parties both by the European Union and by Member States.⁴³ Bilateral agreements of this type exist between Portugal and third party States belonging to the Portuguese-speaking community, such as Angola, Brazil or Mozambique,⁴⁴ with which Portugal maintains a special historical, cultural, social and political relationship that requires a stable, regular and adequate system of air transport if it is to be developed and strengthened.

88. In the same vein, Parpública notes that the agreements concluded with Angola and Mozambique, among other countries, stipulate that the airline appointed to provide connections with Portugal must have its headquarters in Portuguese territory. This means that if it moved its headquarters to another State it would lose the licence and the corresponding traffic rights,⁴⁵ which could very seriously undermine one of the fundamental elements of communication that are the foundation for the traditional relationships between Portugal and the countries of the Lusitanian community of nations, which represent a major cultural and political asset for that Member State.

89. It is for the national court to verify whether that is the case. If it is, then I believe that this selection criterion constitutes a necessary restriction that is not disproportionate.

⁴¹ Paragraph 36 of the written observations of the Netherland’s Government.

⁴² The Netherland’s Government cites the judgment of 7 May 1998, *Clean Car Autoservice* (C-350/96, EU:C:1998:205), paragraphs 36 and 37.

⁴³ Paragraph 52 of its written observations.

⁴⁴ *Ibidem*, paragraph 55.

⁴⁵ Paragraphs 40 and 41 of its written observations.

F. The requirement to maintain and develop the national hub (third question)

90. Article 5(e) of the tender specifications demands of the acquiring company ‘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’.

91. It seems clear that maintaining and developing the hub is linked to a purely economic objective, namely the growth of the national economy.

92. In support of this criterion, it could perhaps be argued (as with the previous criterion under examination), that it is designed to ensure continuity of relations with the countries of the historic and linguistic Portuguese community. However, the clause in the specifications refers only to the ‘vital strategic importance [of the hub] in relations between Europe, Africa and Latin America’, taking for granted that, in the context of the privatisation legislation, the relevance of those relations is justified by reference to the national economy and as a factor that is capable of contributing to economic growth.

93. Given this purely economic dimension, according to the case-law of the Court of Justice, the criterion regarding maintenance of the national hub could not be grounds for the restriction it entails on freedom of establishment.

94. As it was put in the judgment of 21 December 2016, *AGET Iraklis*,⁴⁶ ‘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 obstacles prohibited by the Treaty’.

95. This does not mean that the Court of Justice is impervious to Member States’ economic interests when these are put forward as grounds for hindering freedom of establishment in pursuit of a legitimate social policy objective. Accordingly, the *AGET Iraklis* judgment also states that ‘since the European Union thus has not only an economic but also a social purpose, the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article 151 TFEU, the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion’.⁴⁷

96. However, in the present case it is not possible to identify in that criterion any dimension other than a purely economic one, which is the only dimension cited in the tender specifications on this point. The application of this criterion is a barrier to freedom of establishment for which there is no reasonable justification and which is therefore incompatible with EU law.

VI. Conclusion

97. Having regard to the arguments set out above, I propose that the Court of Justice reply to the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal) in the following terms:

- (1) Article 1(2) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market does not apply to a procedure for the reprivatisation of a public entity that owns the share capital of an air carrier.

⁴⁶ Judgment of 21 December 2016 (C-201/15, EU:C:2016:972), paragraph 72.

⁴⁷ Judgment of 21 December 2016, *AGET Iraklis* (C-201/15, EU:C:2016:972), paragraph 77.

- (2) Articles 49 and 54 TFEU must be interpreted, in situations such as those arising in the present case, as not precluding the inclusion of the following requirements among the requirements governing the reprivatisation process:
- the capacity to comply with the public service obligations on the part of the purchasing entity; and
 - maintenance of the headquarters and effective management of the company in the Member State where it was incorporated, provided that this is essential in order to guarantee the air traffic rights recognised under bilateral agreements concluded by that State with other third-party States with which it has special historical, linguistic, cultural and social ties, where those agreements require the company that holds the corresponding operating licence to have the nationality of the signatory Member State.
- (3) Articles 49 and 54 TFEU must be interpreted as precluding the inclusion among the aforesaid requirements of the ‘contribution to the growth of the national economy, including maintaining and developing the current national hub’.