



Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

2 June 2022*

(Reference for a preliminary ruling – Air transport – Regulation (EC) No 549/2004 – Regulation (EC) No 550/2004 – Air traffic services provider – Decision to close airspace – Exercise of the powers of a public authority – Airspace user – Airlines – Right of appeal against a decision to close airspace – Article 58 TFEU – Freedom to provide services in the field of transport – Articles 16 and 47 of the Charter of Fundamental Rights of the European Union – Freedom to conduct a business – Right to an effective remedy)

In Case C-353/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal de l'entreprise du Hainaut, division de Charleroi (Companies Court, Hainaut, Charleroi Division, Belgium), by decision of 23 July 2020, received at the Court on 31 July 2020, in the proceedings

Skeyes

v

Ryanair DAC,

THE COURT (Third Chamber),

composed of K. Jürimäe (Rapporteur), President of the Chamber, N. Jääskinen, M. Safjan, N. Piçarra and M. Gavalec, Judges,

Advocate General: A. Rantos,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 20 October 2021,

after considering the observations submitted on behalf of:

- Skeyes, by N. Becker, R. Thüngen and K. De Vulder, avocats,
- Ryanair DAC, by A. Cassart, A.-V. Rensonnet and E. Vahida, avocats, S. Rating, abogado and Rechtsanwalt, and by I.-G. Metaxas-Maranghidis, dikigoros,

* Language of the case: French.

- the Belgian Government, by L. Van den Broeck, C. Pochet, S. Baeyens and P. Cottin, acting as Agents, and by L. Delmotte and B. Van Hyfte, advocaten,
- the Spanish Government, by J. Rodríguez de la Rúa Puig, acting as Agent,
- the Polish Government, by B. Majczyna, T. Lisiewski and S. Żyrek, acting as Agents,
- the European Commission, by P. Berghe, T. Franchoo, W. Mölls and B. Sasinowska, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 13 January 2022,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Regulation (EC) No 550/2004 of the European Parliament and of the Council of 10 March 2004 on the provision of air navigation services in the single European sky (OJ 2004 L 96, p. 10), as amended by Regulation (EC) No 1070/2009 of the European Parliament and of the Council of 21 October 2009 (OJ 2009 L 300, p. 34), ('Regulation No 550/2004').
- 2 The request has been made in proceedings between the autonomous public undertaking Skeyes and the airline Ryanair DAC concerning an order issued in a situation of extreme urgency by the Tribunal de l'entreprise du Hainaut, division de Charleroi (Companies Court, Hainaut, Charleroi Division, Belgium), requiring Skeyes, following collective action by its staff, to provide the service over which it has a monopoly so that air traffic may operate normally.

Legal context

European Union law

Regulation No 549/2004

- 3 Recital 3 of Regulation (EC) No 549/2004 of the European Parliament and of the Council of 10 March 2004 laying down the framework for the creation of the single European sky ('the framework Regulation') (OJ 2004 L 96, p. 1), as amended by Regulation No 1070/2009 ('Regulation No 549/2004'), reads as follows:

'Smooth operation of the air transport system requires a consistent, high level of safety in air navigation services allowing optimum use of Europe's airspace and a consistent, high level of safety in air travel, in keeping with the duty of general interest of air navigation services, including public service obligations. It should therefore be carried out to the highest standards of responsibility and competence.'

4 Article 1(1) of that regulation provides:

‘The objective of the single European sky initiative is to enhance current air traffic safety standards, to contribute to the sustainable development of the air transport system and to improve the overall performance of air traffic management (ATM) and air navigation services (ANS) for general air traffic in Europe, with a view to meeting the requirements of all airspace users. This single European sky shall comprise a coherent pan-European network of routes, network management and air traffic management systems based only on safety, efficiency and technical considerations, for the benefit of all airspace users. In pursuit of this objective, this Regulation establishes a harmonised regulatory framework for the creation of the single European sky.’

5 Under Article 2 of that regulation, entitled ‘Definitions’:

‘4. “air navigation services” means air traffic services; communication, navigation and surveillance services; meteorological services for air navigation; and aeronautical information services;

...

8. “airspace users” means operators of aircraft operated as general air traffic;

...’

Regulation No 550/2004

6 Recitals 3 to 5, 10, 13 and 22 of Regulation No 550/2004 read as follows:

‘(3) Regulation (EC) No 549/2004 ... lays down the framework for the creation of the single European sky.

(4) In order to create the single European sky, measures should be adopted to ensure the safe and efficient provision of air navigation services consistent with the organisation and use of airspace as provided for in Regulation (EC) No 551/2004 of the European Parliament and of the Council of 10 March 2004 on the organisation and use of the airspace in the single European sky (the airspace Regulation) [(OJ 2004 L 96, p. 20)]. The establishment of a harmonised organisation for the provision of such services is important in order to respond adequately to the demand of airspace users and to regulate air traffic safely and efficiently.

(5) The provision of air traffic services, as envisaged by this Regulation, is connected with the exercise of the powers of a public authority, which are not of an economic nature justifying the application of the Treaty rules of competition.

...

(10) Whilst guaranteeing the continuity of service provision, a common system should be established for certifying air navigation service providers, which constitutes a means for defining the rights and obligations of those providers and for regular monitoring of compliance with such requirements.

...

(13) The provision of communication, navigation and surveillance services, as well as aeronautical information services, should be organised under market conditions whilst taking into account the special features of such services and maintaining a high level of safety.

...

(22) Air navigation service providers offer certain facilities and services directly related to the operation of aircraft, the costs of which they should be able to recover according to the “user pays” principle, which is to say that airspace users should pay for the costs they generate at, or as close as possible to, the point of use.’

7 Article 1 of that regulation, entitled ‘Scope and objective’, provides in paragraph 1:

‘Within the scope of [Regulation No 549/2004], this Regulation concerns the provision of air navigation services in the single European sky. The objective of this Regulation is to establish common requirements for the safe and efficient provision of air navigation services in the [European Union].’

8 Article 7 of that regulation, entitled ‘Certification of air navigation service providers’, states:

‘1. The provision of all air navigation services within the [European Union] shall be subject to certification by Member States.

...

3. National supervisory authorities shall issue certificates to air navigation service providers where they comply with the common requirements referred to in Article 6. Certificates may be issued individually for each type of air navigation service as defined in Article 2 of [Regulation No 549/2004], or for a bundle of such services, inter alia, where a provider of air traffic services, whatever its legal status, operates and maintains its own communication, navigation and surveillance systems. The certificates shall be checked on a regular basis.

4. Certificates shall specify the rights and obligations of air navigation service providers, including non-discriminatory access to services for airspace users, with particular regard to safety. Certification may be subject only to the conditions set out in Annex II. Such conditions shall be objectively justified, non-discriminatory, proportionate and transparent.

...

7. National supervisory authorities shall monitor compliance with the common requirements and with the conditions attached to the certificates. Details of such monitoring shall be included in the annual reports to be submitted by Member States pursuant to Article 12(1) of [Regulation No 549/2004]. If a national supervisory authority finds that the holder of a certificate no longer satisfies such requirements or conditions, it shall take appropriate measures while ensuring continuity of services. Such measures may include the revocation of the certificate.

...’

9 Article 8 of Regulation No 550/2004, entitled ‘Designation of air traffic service providers’, provides:

‘1. Member States shall ensure the provision of air traffic services on an exclusive basis within specific airspace blocks in respect of the airspace under their responsibility. For this purpose, Member States shall designate an air traffic service provider holding a valid certificate in the [European Union].

2. For the provision of cross-border services, Member States shall ensure that compliance with this Article and Article 10(3) is not prevented by their national legal system requiring that air traffic service providers providing services in the airspace under the responsibility of that Member State:

(a) be owned directly or through a majority holding by that Member State or its nationals;

(b) have their principal place of operation or registered office in the territory of that Member State; or

(c) use only facilities in that Member State.

3. Member States shall define the rights and obligations to be met by the designated air traffic service providers. The obligations may include conditions for the timely supply of relevant information enabling all aircraft movements in the airspace under their responsibility to be identified.

4. Member States shall have discretionary powers in choosing an air traffic service provider, on condition that the latter fulfils the requirements and conditions referred to in Articles 6 and 7.

5. In respect of functional airspace blocks established in accordance with Article 9a that extend across the airspace under the responsibility of more than one Member State, the Member States concerned shall jointly designate, in accordance with paragraph 1 of this Article, one or more air traffic service providers, at least one month before implementation of the airspace block.

6. Member States shall inform the Commission and other Member States immediately of any decision within the framework of this Article regarding the designation of air traffic service providers within specific airspace blocks in respect of the airspace under their responsibility.’

10 Article 15(1) of Regulation No 550/2004 reads:

‘The charging scheme shall be based on the account of costs for air navigation services incurred by service providers for the benefit of airspace users. The scheme shall allocate these costs among categories of users.’

Regulation (EC) No 1008/2008

- 11 Article 2 of Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (OJ 2008 L 293, p. 3) is entitled ‘Definitions’. It provides:

‘For the purposes of this Regulation:

...

14. “traffic right” means the right to operate an air service between two [EU] airports;

...’

- 12 Article 15(1) of that regulation provides:

‘[EU] air carriers shall be entitled to operate [air services within the European Union].’

- 13 Article 19(1) of that regulation states:

‘The exercise of traffic rights shall be subject to published [EU], national, regional and local operational rules relating to safety, security, the protection of the environment and the allocation of slots.’

Belgian law

- 14 Article 1(1) and (4) of the Law of 21 March 1991 reforming certain commercial public undertakings (*Moniteur belge* of 27 March 1991, p. 6155), in the version applicable to the dispute in the main proceedings (‘the Law on public undertakings’), provides:

‘1. Any public interest body which is to enjoy autonomy of management in a given industrial or commercial sector may, once its articles of association have been lawfully brought into line with the provisions of this Title, obtain such autonomy by concluding a management contract with the State in accordance with the conditions laid down in this Law.

...

4. The bodies classified as autonomous public undertakings are:

...

4° Skeyes’.

- 15 Article 170 of the Law on public undertakings provides:

‘Skeyes shall have as its objects:

1° to ensure the safety of air navigation in the airspace for which the Belgian State is responsible under the Convention on International Civil Aviation of 7 December 1944, in particular Annex 2 thereto, approved by the Law of 30 April 1947, or under any other international agreement;

- 2° to monitor at Brussels National Airport the movements of aircraft during approach, landing and take-off and on runways and taxiways, and management of aircraft on aprons, and to continue to ensure the safety of air traffic at regional public airports and aerodromes in accordance with the cooperation agreement concluded with the Regions on 30 November 1989;
- 3° to provide the police service and the aviation and airport inspection service with information concerning aircraft, their piloting, their movements and the observable effects of such aircraft;
- 4° to provide meteorological information for air navigation, and telecommunication services or other services related to the activities referred to in subparagraphs 1° or 2°.

16 Article 171 of the Law on public undertakings provides:

‘The activities referred to in Article 170(1) to (3) shall constitute public service tasks.’

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

- 17 Skeyes was designated by the Kingdom of Belgium, under Article 8 of Regulation No 550/2004, as the air traffic service provider for the airspace under the responsibility of that Member State (‘Belgian airspace’). Its task is, in particular, to ensure the safety of air navigation in Belgian airspace. In that context, Skeyes is authorised to apply what are known as ‘*zero rate*’ measures, meaning that no aircraft may take off or land in, or transit through, Belgian airspace or certain sectors of that airspace.
- 18 Following collective actions by air traffic controllers, Skeyes was forced on several occasions, during the period between February and May 2019, to close Belgian airspace because of a lack of available staff.
- 19 On 16 May 2019, following Skeyes’s decision to close Belgian airspace because of a strike by air traffic controllers, Ryanair, which operates from airports situated in Belgium, lodged an application for interim relief on grounds of extreme urgency with the Tribunal de l’entreprise du Hainaut, division de Charleroi (Companies Court, Hainaut, Charleroi Division), the referring court, seeking an order requiring Skeyes to ensure that air traffic would operate normally.
- 20 That court granted Ryanair’s application by an order issued on the same day together with a financial penalty of EUR 250 000 for each hour that Belgian airspace remained closed on account of the air traffic controllers’ strike. The effects of that order were limited to the period from 16 to 24 May 2019.
- 21 Ryanair received that order on 16 May 2019, after Belgian airspace had been reopened. As no further closure occurred between then and 24 May 2019, that order ceased to be legally effective and no financial penalty was imposed.
- 22 On 21 June 2019, Skeyes brought third-party proceedings against the order of 16 May 2019 before the referring court. It claims, principally, that the referring court lacked jurisdiction to hear and determine the application, which concerns its function as controller of Belgian airspace. Ryanair, it submits, has no subjective right permitting it to make such an application, since the regulation

of Belgian airspace comes under the discretionary power of Skeyes alone. In the alternative, Skeyes submits that, as a company governed by public law, it does not come within the jurisdiction of the referring court, since the latter is a civil court.

- 23 The referring court takes the view that Ryanair’s application was based on the existence of subjective rights, such as its right not to be disproportionately hampered in the pursuit of its airline business, its right to bring an action for damages against Skeyes, and its right to apply for an order prohibiting the latter, under penalty of a fine, from closing the airspace once again.
- 24 That court is unsure whether, despite Skeyes’s discretionary power to determine whether it is appropriate to close Belgian airspace, airlines such as Ryanair must possess an effective remedy under Regulation No 550/2004 allowing them to ensure the protection of their rights in the event of failures on the part of Skeyes.
- 25 In those circumstances, the Tribunal de l’entreprise du Hainaut, division de Charleroi (Companies Court, Hainaut, Charleroi Division), decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) Must Regulation No 550/2004, in particular Article 8 thereof, be interpreted as meaning that it authorises the Member States to remove from review by the courts of that Member State any alleged failures to fulfil the obligation to provide services by the air traffic services provider, or must the provisions of [Regulation No 550/2004] be interpreted as meaning that they require the Member States to provide an effective remedy against any such alleged breaches, account being taken of the nature of the services to be provided?
- (2) Must Regulation No 550/2004, inasmuch as it states that “the provision of air traffic services, as envisaged by this Regulation, is connected with the exercise of the powers of a public authority, which are not of an economic nature justifying the application of the Treaty rules on competition”, be interpreted as precluding not only the rules on competition per se, but also any other rules applicable to public undertakings active on a market for goods and services which have an indirect effect on competition, such as those prohibiting hindrances to the freedom to conduct business and to provide services?’

Admissibility of the request for a preliminary ruling

- 26 The Belgian Government considers that both questions referred for a preliminary ruling are inadmissible.
- 27 With regard to the first question, it submits, the referring court merely reiterated the position held by Skeyes. It failed to specify the relevant national legal framework and to explain the usefulness of that question in resolving the dispute. As for the second question, it is drafted in terms that are too general to enable the parties and other interested persons to submit written observations and fails to meet, in particular, the requirements of Article 94 of the Rules of Procedure of the Court of Justice.
- 28 In that regard, it should be noted that, according to settled case-law of the Court, questions on the interpretation of EU law referred for a preliminary ruling by a national court in the legislative and factual context which that court is responsible for defining, and the accuracy of which is not a matter for the Court of Justice to determine, enjoy a presumption of relevance. The Court may

refuse to give a ruling on a question referred by a national court for a preliminary ruling, under Article 267 TFEU, only where, for instance, the requirements concerning the content of a request for a preliminary ruling, set out in Article 94 of the Rules of Procedure, are not satisfied or where it is quite obvious that the interpretation of a provision of EU law, or the assessment of its validity, which is sought by the national court, bears no relation to the actual facts of the main action or to its purpose, or where the problem is hypothetical (judgment of 25 March 2021, *Obala i lučice*, C-307/19, EU:C:2021:236, paragraph 48 and the case-law cited).

- 29 In the present case, it is quite clear from the explanations provided by the referring court in its request for a preliminary ruling and, in particular, from its observations concerning the national case-law regarding the jurisdiction of the civil courts, that it considers that the answer to the questions raised is necessary to enable it to rule on the dispute before it. In particular, those questions must enable it, first, to rule on its own jurisdiction in relation to the powers of Skeyes under Regulation No 550/2004, and, secondly, to decide whether an airline may rely on the freedom to conduct a business or to provide services against a decision taken by Skeyes in the context of its powers as a public authority.
- 30 It follows from the foregoing that the questions referred for a preliminary ruling are admissible.

The questions referred for a preliminary ruling

Preliminary observations

- 31 It should be noted that Regulation No 550/2004, to which the questions referred relate, must, in accordance with recitals 3 and 4 and Article 1(1) of that regulation, be viewed in the context of the provisions of Regulation No 549/2004, which establishes the framework for the creation of the single European sky.
- 32 In accordance with Article 1(1) of Regulation No 549/2004, the single European sky is designed to enhance current air traffic safety standards, to contribute to the sustainable development of the air transport system and to improve the overall performance of air traffic management and air navigation services for general air traffic in Europe, with a view to meeting the requirements of all airspace users. Those users are defined in Article 2.8 of that regulation as being operators of aircraft operated as general air traffic.
- 33 It follows therefore from the provisions referred to in the preceding paragraph that airlines, being the operators of aircraft, are airspace users.
- 34 It is in the light of those considerations that the questions raised by the referring court should be answered.

First question

- 35 By its first question, the referring court asks, in essence, whether Article 8 of Regulation No 550/2004 must be interpreted as conferring on airspace users, such as airlines, the right to an effective remedy before the national courts against the air traffic services provider in order to submit to judicial review any alleged failures by the latter to fulfil its obligation to provide services in the exercise of its powers as a public authority.

- 36 In order to answer that question, it should be noted that Article 8(1) of Regulation No 550/2004 provides that Member States are to ensure the provision of air traffic services on an exclusive basis within specific airspace blocks in respect of the airspace under their responsibility and to designate, for that purpose, an air traffic service provider holding a valid certificate in the European Union. Article 8(3) of that regulation states expressly that it is the Member States that are to define not only the rights but also the obligations of the designated air traffic service provider.
- 37 Furthermore, that regulation does not contain any special provision designed to grant airspace users a right to a legal remedy against the decisions of that provider.
- 38 In those circumstances, in order to determine whether, despite the fact that Article 8 of Regulation No 550/2004 is silent in that regard, those users do nonetheless have such a right, it is necessary to take into account not only the wording of that provision but also its context and the objectives pursued by the legislation of which it forms part.
- 39 It is clear both from the context of Article 8 of Regulation No 550/2004 and from the latter's objective that airspace users, such as airlines, enjoy certain rights that may be affected by airspace closure.
- 40 In the first place, regarding the context of Article 8 of Regulation No 550/2004, it must be observed, first, that Article 7(3) of that regulation states that the certificates needed in order to provide air navigation services may be issued by the national supervisory authorities to air navigation service providers for each type of air navigation service as defined in Article 2 of Regulation No 549/2004 or for a bundle of such services.
- 41 According to Article 2(4) of Regulation No 549/2004, those services include, besides air traffic services, communication, navigation and surveillance services, meteorological services for air navigation and aeronautical information services. It follows, moreover, from recital 3 of Regulation No 549/2004 that those services are covered by a duty of general interest, including public service obligations.
- 42 Secondly, Article 7(4) of Regulation No 550/2004 requires that airspace users should have non-discriminatory access to those services. In addition, it is those users who must, under Article 15 of that regulation, read in the light of recital 22 thereof, bear the costs for air navigation services provided for their benefit or directly related to the operation of aircraft.
- 43 Accordingly, it is apparent from the context of Article 8 of Regulation No 550/2004 that the obligations of the air traffic services provider designated on the basis of that provision are all services likely to be necessary for the economic activity of airspace users.
- 44 Secondly, regarding the objectives of Regulation No 550/2004, it is clear from recital 10 and from Article 1(1) and Article 7(1) and (7) of that regulation that the latter is intended to ensure continuity of the provision of all air navigation services in the single European sky.
- 45 It follows that, in view of the context of Article 8 of Regulation No 550/2004 and the objective pursued by that regulation, the obligations referred to in Article 8 of that regulation, read in conjunction with Article 2(4) of Regulation No 549/2004, constitute services provided in the interest of airspace users and may therefore confer on them rights that might be affected by airspace closure.

- 46 However, although airspace users such as airlines enjoy rights conferred by the relevant EU secondary law, those users are also subject to the rules of EU safety law, as shown, first, by recital 3 of Regulation No 549/2004 and, secondly, by Article 19(1) of Regulation No 1008/2008. As the Advocate General notes in point 43 of his Opinion, the objective of air safety lies at the heart of Regulations No 549/2004 and No 550/2004. It forms part of the context in which a decision to close airspace is taken by an air traffic services provider.
- 47 Furthermore, as the Advocate General also noted in point 38 of his Opinion, those users also enjoy the rights and freedoms conferred by EU primary law, including the freedom to conduct a business recognised in Article 16 of the Charter of Fundamental Rights of the European Union ('the Charter').
- 48 Article 16 of the Charter provides for recognition of the freedom to conduct a business in accordance with EU law and national laws and practices. The protection afforded by that article covers the freedom to exercise an economic or commercial activity, freedom of contract and free competition (see, to that effect, judgments of 22 January 2013, *Sky Österreich*, C-283/11, EU:C:2013:28, paragraphs 41 and 42, and of 15 April 2021, *Federazione nazionale delle imprese elettrotecniche ed elettroniche (Anie) and Others*, C-798/18 and C-799/18, EU:C:2021:280, paragraphs 55 and 56).
- 49 It follows that an airspace user such as Ryanair enjoys certain rights under Article 8 of Regulation No 550/2004, read in conjunction with Article 2(4) of Regulation No 549/2004, and that those rights must be considered to be potentially infringed by a decision to close airspace taken by an air traffic services provider.
- 50 With regard to the rights and freedoms guaranteed by EU law, the first paragraph of Article 47 of the Charter states that everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy under the conditions laid down in that article.
- 51 The obligation imposed on the Member States in the second subparagraph of Article 19(1) TEU, to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law, corresponds to that right (judgments of 16 May 2017, *Berlioz Investment Fund*, C-682/15, EU:C:2017:373, paragraph 44, and of 6 October 2020, *État luxembourgeois (Right to bring an action against a request for information in tax matters)*, C-245/19 and C-246/19, EU:C:2020:795, paragraph 47).
- 52 However, in the absence of EU rules on the matter, it is, in accordance with the principle of procedural autonomy, for the national legal order of each Member State to establish procedural rules for the remedies, on condition, however, that those rules are not – in situations governed by EU law – less favourable than in similar situations governed by national law (principle of equivalence) and that they do not make it impossible in practice or excessively difficult to exercise the rights conferred by EU law (principle of effectiveness) (see, to that effect, judgment of 21 December 2021, *Randstad Italia*, C-497/20, EU:C:2021:1037, paragraph 58).
- 53 Moreover, since the main proceedings concern a request made on grounds of extreme urgency, it must be pointed out also that a court seised of a dispute governed by EU law must be in a position to grant interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under EU law (judgments of 13 March 2007, *Unibet*, C-432/05,

EU:C:2007:163, paragraph 67, and of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraph 297).

- 54 Since only the principle of effectiveness is at issue in the present case, it must be borne in mind that EU law does not have the effect of requiring Member States to establish remedies other than those established by national law, unless it is apparent from the overall scheme of the national legal system in question that no legal remedy exists that would make it possible to ensure, even indirectly, respect for the rights that individuals derive from EU law, or the sole means of obtaining access to a court is effectively for individuals to break the law (judgment of 21 December 2021, *Randstad Italia*, C-497/20, EU:C:2021:1037, paragraph 62).
- 55 As regards the dispute in the main proceedings, it is apparent from the order for reference that a duality exists regarding the jurisdiction of the civil courts and that of the Conseil d'État (Council of State, France). In that regard, it is permissible, under EU law, for the Member State concerned to choose to confer jurisdiction to rule in a dispute on an administrative court or to confer such jurisdiction on the civil courts, or even on both, according to the rules for the allocation of jurisdiction which it determines, provided that those rules do not make it impossible in practice or excessively difficult to exercise the rights conferred by EU law.
- 56 By contrast, if the discretionary power enjoyed, as the case may be, by an administrative authority or an autonomous public undertaking such as Skeyes, in the exercise of its powers as a public authority may be taken into account in order to determine the extent of the judicial review (see, to that effect, judgment of 2 September 2021, *Association of Independent Meat Suppliers and Cleveland Meat Company*, C-579/19, EU:C:2021:665, paragraphs 78 and 79), it cannot mean that the court which is capable of ensuring that the rights conferred by EU law can be exercised and that the appeal is effective would lack jurisdiction.
- 57 In view of the foregoing, the answer to the first question is that Article 8 of Regulation No 550/2004, read in conjunction with Article 2(4) of Regulation No 549/2004 and in the light of Article 47 of the Charter, must be interpreted as conferring on airspace users, such as airlines, the right to an effective remedy before the national courts against an air traffic services provider in order to submit for judicial review any alleged failures by the latter to fulfil its obligation to provide services.

Second question

- 58 By its second question, the referring court asks, in essence, whether Regulation No 550/2004, read in the light of recital 5 thereof and of Article 58(1) TFEU and Article 16 of the Charter, must be interpreted as precluding not only application of the rules on competition laid down in the FEU Treaty to the provision of air navigation services connected with the exercise of the powers of a public authority, as provided for by that regulation, but also application of the rules relating to the rights and freedoms of airspace users, such as freedom to provide services and freedom to conduct a business.
- 59 Recital 5 of Regulation No 550/2004 states that the provision of air traffic services, as envisaged by that regulation, is connected with the exercise of the powers of a public authority, which are not of an economic nature justifying the application of the Treaty rules on competition.

- 60 In that regard, it should be noted first of all that the preamble of an EU act may explain the content of the provisions of that act but it has no binding legal force. It cannot therefore be relied on as a ground either for derogating from the actual provisions of the act in question or for interpreting those provisions in a manner that is clearly contrary to their wording (judgment of 19 December 2019, *Puppinck and Others v Commission*, C-418/18 P, EU:C:2019:1113, paragraphs 75 and 76).
- 61 However, the substance of recital 5 of Regulation No 550/2004 is not given concrete expression by any provision of that regulation.
- 62 Next, although that recital reflects, in essence, the Court's case-law to the effect that the provision of air navigation services, since it is connected with the exercise of the powers of a public authority, is not of an economic nature justifying the application of the FEU Treaty rules on competition (see, to that effect, judgments of 19 January 1994, *SAT Fluggesellschaft*, C-364/92, EU:C:1994:7, paragraph 30, and of 26 March 2009, *Selex Sistemi Integrati v Commission*, C-113/07 P, EU:C:2009:191, paragraph 71), recital 13 of Regulation No 550/2004 states, by contrast, that the provision of communication, navigation and surveillance services, as well as aeronautical information services, should be organised under market conditions.
- 63 Lastly, although the provision of air navigation services is connected with the exercise of the powers of a public authority, which allows Member States to designate, on the basis of Article 8 of Regulation No 550/2004, an air traffic services provider outside the rules on competition, that does not mean that airspace users are thereby deprived of enjoyment of the rights and freedoms recognised by EU law, such as the freedom to provide services in the field of transport referred to in Article 58(1) TFEU.
- 64 Moreover, as stated in paragraphs 47 and 48 of the present judgment, airlines also enjoy the freedom to conduct a business enshrined in Article 16 of the Charter and recognised in accordance with EU law and national laws and practices.
- 65 It should, however, be noted that the freedom to conduct a business is not absolute. It may be subject to a broad range of interventions on the part of public authorities which may limit the exercise of economic activity in the public interest (see, to that effect, judgments of 22 January 2013, *Sky Österreich*, C-283/11, EU:C:2013:28, paragraphs 45 and 46; of 16 July 2020, *Adusbef and Others*, C-686/18, EU:C:2020:567, paragraph 83; and of 24 September 2020, *YS (Occupational pensions of managerial staff)*, C-223/19, EU:C:2020:753, paragraph 88).
- 66 Furthermore, Article 52(1) of the Charter allows limitations to be imposed on the exercise of the rights and freedoms recognised by the Charter, such as the freedom to conduct a business, as long as those limitations are provided for by law, respect the essence of those rights and freedoms and, subject to the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others (judgments of 16 July 2020, *Adusbef and Others*, C-686/18, EU:C:2020:567, paragraph 86, and of 24 September 2020, *YS (Occupational pensions of managerial staff)*, C-223/19, EU:C:2020:753, paragraph 88).
- 67 It is for the referring court, where necessary, to determine whether those conditions are met. It may nonetheless be pointed out in this regard that, as is clear from paragraph 46 of the present judgment, the exercise of the right of airspace users such as airlines to operate air services within the European Union is subject to safety requirements. Furthermore, the Court has already had

occasion to confirm that the objective of establishing and maintaining a high uniform level of civil aviation safety in Europe constitutes an objective of general interest (see, to that effect, judgment of 5 July 2017, *Fries*, C-190/16, EU:C:2017:513, paragraph 43).

- 68 In view of the foregoing, the answer to the second question is that Regulation No 550/2004, read in the light of recital 5 thereof and of Article 58(1) TFEU and Article 16 of the Charter, must be interpreted as precluding application of the rules on competition laid down in the FEU Treaty to the provision of air navigation services connected with the exercise of the powers of a public authority, such as those provided for by that regulation, but as not precluding application of the rules of the FEU Treaty and of the Charter relating to the rights and freedoms of airspace users, such as those connected with the freedom to provide services in the field of transport and the freedom to conduct a business.

Costs

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

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

- 1. Article 8 of Regulation (EC) No 550/2004 of the European Parliament and of the Council of 10 March 2004 on the provision of air navigation services in the single European sky, as amended by Regulation (EC) No 1070/2009 of the European Parliament and of the Council of 21 October 2009, read in conjunction with Article 2(4) of Regulation (EC) No 549/2004 of the European Parliament and of the Council of 10 March 2004 laying down the framework for the creation of the single European sky ('the framework Regulation'), as amended by Regulation No 1070/2009, and in the light of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as conferring on airspace users, such as airlines, the right to an effective remedy before the national courts against the air traffic services provider in order to submit to judicial review any alleged failures by the latter to fulfil its obligation to provide services.**
- 2. Regulation No 550/2004, as amended by Regulation No 1070/2009, read in the light of recital 5 thereof and of Article 58(1) TFEU and Article 16 of the Charter of Fundamental Rights, must be interpreted as precluding application of the rules on competition laid down in the FEU Treaty to the provision of air navigation services connected with the exercise of the powers of a public authority, such as those provided for by that regulation, but as not precluding application of the rules of the FEU Treaty and of that Charter relating to the rights and freedoms of airspace users, such as those connected with the freedom to provide services in the field of transport and the freedom to conduct a business.**

[Signatures]