OPINION OF ADVOCATE GENERAL CRUZ VILLALÓN
delivered on 30 September 2010[1]

1. These preliminary ruling proceedings provide the Court of Justice with the opportunity to continue to study in depth[2] the specific role of freedom to provide services in the transport sector, the distinction between freedom to provide services and freedom of establishment and the functioning of those two freedoms, the effective exercise of which ensures the proper functioning of the 'area without internal frontiers'[3] at the heart of the European Union.

I — Applicable law

A — *European Union law*

2. The Unabhängiger Verwaltungssenat Wien (Independent Administrative Chamber, Vienna) requests the Court of Justice to rule on the compatibility with Articles 49 TFEU, 56 TFEU and 101 TFEU of a provision of national law which requires that, in order to operate a 'tourist bus service', the undertaking making the application must, (a) already hold a seat or another establishment (in which the economic activity at issue is to be developed) in the Member State of the authorising authority at the time the licence is granted or, at the latest, from the time operation of the service commences, and (b) not adversely affect the profitability of a competing undertaking which runs such a service on a partially or entirely identical route.

3. Article 49 TFEU (formerly Article 43 EC) regulates '[w]ithin the framework of the provisions set out below' the right of establishment of nationals of a Member State in the territory of another Member State, and prohibits any restrictions thereon. It extends that prohibition to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of another Member State, and includes within the freedom of establishment 'the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within

1 — Original language: Spanish.

2 — Advocate General Mengozzi has recently had the opportunity to do the same, yet from a different perspective in his Opinion of 7 September 2010 in *Neukirchinger* (C-382/08).

3 — Article 26(2) TFEU.

the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected …'.

4. Also '[w]ithin the framework of the provisions set out below', Article 56 TFEU (formerly Article 49 EC) prohibits restrictions on freedom to provide services within the European Union in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

5. In accordance with Article 58(1) TFEU (formerly Article 51 EC), '[f]reedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport'.

6. With a view to ensuring the effective implementation of a common transport policy, Article 91(1)(b) TFEU entrusts the European Parliament and the Council with the task of laying down 'the conditions under which non-resident carriers may operate transport services within a Member State'.

B — *Austrian law*

7. In accordance with the Kraftfahrliniengesetz (Law on omnibus line transport; 'the KflG') [4] bus services which stop at fixed stopping points in accordance with a timetable may be provided after obtaining a licence (Paragraph 1), for which very specific requirements need to be met (Paragraph 2), and which is to be granted by the Landeshauptmann (first minister) (Paragraph 3). Undertakings which are not Austrian are required to have a seat or another establishment in Austria (Paragraph 7(1)(2)) in order to be on an equal footing with Austrian licence applicants. Furthermore, the grant of a licence is to be regarded as contrary to the public interest if the service may put in jeopardy the transport services provided by an undertaking already operating in the area in which the service applied for is situated. That is deemed to occur when the services provided by the licensed undertaking would be so seriously affected as a result that its revenue would be reduced to such an extent as to put the profitability of the service at risk (Paragraph 7(1)(4)(b), in conjunction with Paragraph 14(1) to (3)).

II — Facts

8. On 25 January 2008, the German company Yellow Cab Verkehrsbetriebs GmbH ('Yellow Cab') applied, pursuant to the KflG, for a licence to operate a tourist bus service exclusively within the territory of the

4 — In the version published in BGBl No 153/2006.

municipality of Vienna on a specified route and with fixed stopping points. That route was practically fully covered already by a group of undertakings. [5]

9. Yellow Cab's application was rejected on 13 March 2009 by the competent authority upon hearing that granting the licence would be detrimental to road safety. Yellow Cab appealed against that decision before the Unabhängiger Verwaltungssenat Wien, which dismissed the appeal but on different grounds. It found that, on the basis of Austrian law, Yellow Cab's appeal had to be dismissed as, first, the company did not have a seat or another establishment in Austria when applying for the licence and, second, the profitability of the undertaking already operating on the route would be seriously compromised as a result.

III — The questions referred for a preliminary ruling and the proceedings before the Court of Justice

10. Since the Unabhängiger Verwaltungssenat Wien harbours doubts as to the compatibility with European Union law of the requirements laid down in the Austrian legislation, it decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is it compatible with the freedom of establishment and the freedom to provide services within the meaning of Article 43 et seq. EC and Article 49 et seq. EC and with EU competition law for the purposes of Article 81 et seq. EC for a provision of national law relating to the grant of authorisation to operate a motor vehicle service, and thus to provide public transport, where fixed stopping points are called at regularly in accordance with a timetable, to lay down the following as conditions for such authorisation:

(a) that the EU undertaking making the application must already have a registered office or a branch in the State of the authorising authority before commencing operation of the service and in particular at the time the licence is granted;

(b) that the EU undertaking making the application must already have a registered office or a branch in the State of the authorising authority at the latest from the time operation of the service commences?

2. Is it compatible with the freedom of establishment and the freedom to provide services within the meaning of Article 43 et seq. EC and Article 49 et seq. EC and with EU competition law for the

5 — Namely, according to the decision to refer, the group made up of Kraftfahrlinie der Vereinigung Austrobus Österreichische Autobusgesellschaft KG, Blaguss Reisen GmbH, Elite Tours Verkehrsbetrieb GMBH und Vienna Sightseeing Tours - Wiener Rundfahrten GmbH & Co KG, pursuant to a licence granted on 17 May 2005.

purposes of Article 81 et seq. EC for a provision of national law relating to the grant of authorisation to operate a motor vehicle service, and thus to provide public transport where fixed stops are called at regularly in accordance with a timetable, to provide that authorisation is to be refused where, if the motor vehicle service applied for commences, the revenues of a competing undertaking running on a partially or entirely identical short route will be so substantially reduced by this service that the continued running of the service operated by the competing undertaking will no longer be economically viable?'

11. That reference for a preliminary ruling was lodged at the Registry of the Court of Justice on 24 August 2009.

12. In its written observations Yellow Cab submits that the requirements under Austrian law are invalid, while the Austrian Government, after questioning the admissibility of the second question, contends that they are compatible with European Union law; in particular, it considers that it is not legally admissible in this case to invoke the freedom to provide services. In line with this the German Government, which focuses exclusively on the requirement of a seat or another establishment, denies the claim that there has been an infringement of the freedom of establishment, as does the Italian Government, which further claims that the defence of the economic interests of the licensed service provider may be justified. Finally, the Commission rules out that either the principle of free competition or the free movement of services has been infringed in this case since the freedom of establishment permits the requirement of a seat or another establishment, although it restricts such a requirement to the moment immediately the service begins operating.

13. It needs to be borne in mind that, in each of its two questions, the Unabhängiger Verwaltungssenat Wien examines the requirements of the Austrian legislation in the light of three forms of primary law, that is to say, freedom to provide services, freedom of establishment and competition. I shall systematically analyse each of those requirements solely from the point of view of the two fundamental freedoms, in order to address subsequently the impact of competition on this case.

IV — Analysis of the first question

A — *From the point of view of the freedom to provide services*

14. As I have just indicated, the national court gives priority to freedom to provide services and freedom of establishment as parameters

for assessing the case at hand, which requires those two freedoms to be distinguished from one another at the outset.

1. The distinction between freedom to provide services and the right of establishment

15. As a starting point it should be noted that, in its settled case-law, the Court of Justice has devised decisive criteria for distinguishing 'provision of services' from 'establishment'.

16. The stability and continuity of the activity give reason to believe that the concept of establishment allows a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social interpenetration within the Community in the sphere of activities as self-employed persons. [6]

17. By contrast, it is the 'temporary' nature of the activity [7] which determines whether a given economic activity is to be regarded as a 'provision of services', providing clarity to the vague distinction between the two freedoms. [8]

18. Those criteria are particularly relevant in the circumstances of the present case because the description of the facts provided by the national court and the nature of the service proposed by Yellow Cab point in the direction of an activity to be carried on on a permanent basis or, in any event, without foreseeable restriction as to its duration; aspects which the Court of Justice has taken account of expressly in rejecting the application of provisions relating to the freedom to provide services. [9] In summary, an activity such as the one proposed by Yellow Cab which, as a result of its characteristics, requires a certain amount of permanence and stability in the

6 — As follows from Case 2/74 *Reyners* [1974] ECR 631, paragraph 21; Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 25; and Case C-386/04 *Centro di Musicologia Walter Stauffer* [2006] ECR I-8203, paragraph 18.

7 — A temporary nature which, as per *Gebhard*, paragraphs 25 to 28, has to be determined in the light, not only of the duration of the provision of the service, but also of its regularity, periodicity or continuity. Accordingly, if the participation of the person concerned in the economic life of the host Member State is not on a stable and continuous basis then the free movement of services is applicable as opposed to the right of establishment.

8 — Vague since, in the end, as illustrated in Case C-215/01 *Schnitzer* [2003] ECR I-14847, paragraphs 30 and 31; Case C-171/02 *Commission* v *Portugal* [2004] ECR I-5645, paragraph 26; and Case C-208/07 *von Chamier-Glisczinski* [2009] ECR I-6095, paragraph 74, 'no provision of the Treaty affords a means of determining, in an abstract manner, the duration or frequency beyond which the supply of a service or of a certain type of service can no longer be regarded as the provision of services within the meaning of the Treaty. Thus, "services" within the meaning of the Treaty may cover services varying widely in nature, including services which are provided over an extended period, even over several years'.

9 — Judgments in Case 196/87 *Steymann* [1988] ECR 6159, paragraph 16; *Schnitner*, paragraphs 27 to 29; and Case C-456/02 *Trojani* [2004] ECR I-7573, paragraph 28.

Member State in which the activity is to take place, falls within the scope of freedom of establishment (Article 49 TFEU) rather than in the scope of freedom to provide services (Article 56 TFEU).

2. Freedom to provide services within the context of European Union transport policy

19. In any event, and irrespective of the above, it must not be forgotten that the activity proposed by Yellow Cab appears to fall clearly within the transport sector, in which the task of developing the freedom to provide services is entrusted, in accordance with Article 58 TFEU, to secondary legislation on common transport policy. [10]

20. In the absence of a special sectoral provision in the field of transport, it is settled case-law that Article 56 TFEU is not to be used as a parameter to determine the extent to which European Union law opposes a national measure in the light of the narrow leeway granted by the Court of Justice in the field. [11] It is thus necessary to determine whether there is a legal provision of that nature in the present case.

21. To begin with, Regulation (EEC) No 1191/69, [12] amended by Regulation (EEC) No 1893/91, [13] is not applicable in this case [14] because it does not regulate expressly the freedom to provide services within the meaning of Article 56 TFEU. Similarly, Regulation (EEC) No 684/92 [15] is also inapplicable since

10 — Obviously, as already pointed out in Case 167/73 *Commission* v *France* [1974] ECR 359, paragraph 25, the common transport policy, far from excluding the fundamental freedoms, aims to implement and compliment them. In addition, given that it is also based on the freedom to provide services, that policy needs to be interpreted in the light of Article 56 TFEU (Case 13/83 *Parliament* v *Council* [1985] ECR 1513, paragraph 62; Case C-49/89 *Corsica Ferries France* [1989] ECR 4441, paragraphs 10 to 12; Case C-361/98 *Italy* v *Commission* [2001] ECR I-385, paragraphs 31 to 33; and Case C-266/96 *Corsica Ferries France* [1998] ECR I-3949, paragraph 55 et seq.), which is not precluded by Article 58(1) TFEU, which does not forgo the objectives pursued by that specific freedom in the internal market.

11 — It is sufficient to refer to Case 13/83 *Parliament* v *Council* [1985] ECR 1513, paragraphs 62 and 63, cited in Case 4/88 *Lambregts Transportbedrijf* [1989] ECR 2583, paragraph 14, in which the fact that the Council failed to fulfil its obligations under Article 75 of the Treaty (now Articles 90 TFEU and 91 TFEU) could not render Articles 59 and 60 of the Treaty (now Articles 56 TFEU and 57 TFEU) directly applicable in the transport sector. On the same lines, in *Corsica Ferries*, after noting that the free movement of services in the field of transport is governed by the provisions of the title relating to transport (paragraph 10), the Court did not condemn a national regulation which restricted Article 56 TFEU at a time (1981 and 1982) when 'freedom to provide services in maritime transport had not yet been implemented and that consequently the Member States were entitled to apply provisions such as those at issue in the main proceedings' (paragraph 14).

12 — Council Regulation of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (OJ 1969 L 156, p. 1), still applicable *ratione temporis*.

13 — Council Regulation of 20 June 1991 amending Regulation (EEC) No 1191/69 (OJ 1991 L 169, p. 1).

14 — Bear in mind, none the less, that Regulation 1893/91 repealed the original Article 19(2) which excluded from its scope transport undertakings other than rail mainly providing transport services of a local or regional character.

15 — Council Regulation of 16 March 1992 on common rules for the international carriage of passengers by coach and bus (OJ 1992 L 74, p. 1).

it concerns only international transport, as is Regulation (EC) No 12/98,[16] Article 3 of which authorises cabotage transport only for '… regular services, provided they are performed by a carrier not resident in the host Member State in the course of a regular international service in accordance with Regulation (EEC) No 684/92. Cabotage transport cannot be performed independently of such international service. Urban and suburban services shall be excluded from the scope of this point.'

22. Furthermore, Regulation 1370/2007,[17] which also expressly exempts services which are operated mainly for their historical interest or tourist value (Article 1(2)), does not apply *ratione temporis*, nor does Regulation (EC) No 1073/2009[18] for the same temporal reason and the fact that it excludes 'transport services meeting the needs of an urban centre or conurbation' and those which are performed 'independently of such international service' (Article 15(c)).

23. Consequently, in the absence of a special legal provision which, for a situation such as this, expounds the freedom to provide services in the field of transport policy, it is impossible to assess the requirements laid down in the Austrian legislation in the light of Article 56 TFEU.

B — *From the point of view of the right of establishment*

24. Next, it is necessary to examine the lawfulness of the requirements laid down in the Austrian legislation from the perspective of the right of establishment and the legal consequences resulting from it, that is to say, the effective pursuit of an economic activity on a stable and continuous basis in accordance with the requirements laid down by the law of the country of establishment for its own nationals (second paragraph of Article 49 TFEU).

1. The requirement of authorisation as a prerequisite for undertaking the activity

25. The requirement of authorisation constitutes, in principle, a restriction of freedom of establishment, which can be justified only if

16 — Council Regulation of 11 December 1997 laying down the conditions under which non-resident carriers may operate national road passenger transport services within a Member State (OJ 1998 L 4, p. 10).

17 — Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70.

18 — Regulation of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international market for coach and bus services, and amending Regulation (EC) No 561/2006 (OJ 2009 L 300, p. 88).

appropriate to ensure the attainment of the objectives which it pursues, and must, in addition, be based on objective, non-discriminatory criteria known in advance, in such a way as adequately to circumscribe the exercise of the national authorities' discretion, [19] thereby eliminating discretionary conduct liable to negate the effectiveness of provisions of European Union law relating to that fundamental freedom.

26. Pursuant to Article 52(1) TFEU, restrictions of the right of establishment may be justified on grounds of public policy, public security or public health, but in order to be justified they must be appropriate to achieve the aim pursued and must not go beyond what is necessary to achieve that aim. This criterion of proportionality, which the Court has consistently applied in its case-law on the fundamental freedoms, is usually described as the appropriateness test and the necessity test respectively, the limits of which are of course exceeded if the pursued aims can be achieved by less restrictive measures. [20]

27. Without its being necessary to address the legal category of service in the public interest, I consider the activity of operating a city bus service for tourists with fixed stopping points not devoid of a certain public interest, given that there are a number of factors at issue, such as the security and integrity of persons, road safety or even sound management of urban transport planning, [21] which may justify making the grant of a licence subject to authorisation, without running counter to European Union law. In order to meet those objectives, '[a] prior examination carried out by the competent administration might appear better able … whilst a system of checks *a posteriori* could well occur at too late a stage, in particular when significant expenditure has already been made and is not easily recoverable'. [22]

28. The requirement of a seat or another establishment, on the one hand, and the protection of the economic interests of the licensed operator, on the other, constitute separate conditions for the grant of authorisation and need to be analysed separately.

19 — see Case C 169/07 Hartlauer [2009] ECR I 1721, in particular paragraph 64.

20 — Joined Cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera and Others* [1995] ECR I-4821, paragraphs 23 to 28; Case C-205/99 *Analir and Others* [2001] ECR I-1271, paragraph 35; and Case C-567/07 *Woningstichting Sint Servtius* [2009] ECR I-9021, paragraph 33.

21 — In addition, that criterion appeared to constitute the only justification for rejecting the licence application.

22 — A criterion set out expressly in *Woningstichting Sint Servatius*, paragraph 34.

C — *The requirement of a seat or another establishment*

29. The Austrian legislation makes the grant of a licence subject to the requirement that the applicant undertaking hold a seat or another establishment in Austria. In so far as it is necessary to identify the point in time at which that requirement takes effect, it is first necessary to analyse the nature of that requirement as such, in order then to investigate its temporal dimension.

1. The requirement of a seat or another establishment as such

30. Unlike in the context of the freedom to provide services, in which the requirement of a permanent establishment is liable to infringe Article 56 TFEU, and even constitute 'the very negation of that freedom',[23] the obligation to hold an establishment — in line with the Commission's reasoning in points 32 and 33 of its observations as forming part of a licence — appears to be perfectly in keeping with Article 49 TFEU, a provision which grants undertakings of one Member State the right to 'establish themselves' in another Member State.[24]

31. The requirements imposed by each Member State on undertakings wishing to establish themselves in its territory are also likely to influence their final decision; planning to carry on economic activity in a Member State in which the requirements for establishment are acceptable from a bureaucratic and economic point of view is not the same as planning to do so in another Member State in which the conditions are so onerous that they act as a disincentive for foreign undertakings. The fine line between the two categories is precisely what distinguishes requirements permissible under European Union law from those which, depending on their extent, may well not be.

32. The Court of Justice tends to use an eminently factual notion, independent of any specific legal requirements and certainly of national institutions, referring merely to a permanent presence.[25] None the less, the mere requirement of a seat or another

23 — The unequivocal terms used in Case C-205/84 *Commission* v *Germany* [1986] ECR 3755, paragraph 52.

24 — The requirement of having a registered office in order to obtain the necessary authorisation for a bio-medical analysis laboratory constitutes, in the Court's view, an infringement of the freedom to provide services, but not of the freedom of establishment as such, in that that obligation did not require that the establishment be turned into the main registered office (Case C-496/01 *Commission* v *France* [2004] ECR I-2351, paragraphs 61 and 64 to 77). None the less, on occasion, such a requirement may also constitute a barrier to the freedom of establishment, not because of the requirement of a registered office or branch, but because of the obligation imposed on both managers and staff of security firms and internal security services to reside in the territory of the Member State in which the companies are established (Case C-355/98 *Commission* v *Belgium* [2000] ECR I-1221, paragraphs 31 to 34 and 41).

25 — *Centro di Musicologia Walter Stauffer*, paragraph 19.

establishment as a prerequisite for authorisation, in so far as that requirement is, by definition, automatically satisfied by those resident in Austria, becomes tantamount to a restriction which needs to be sufficiently justified in order not to constitute indirect discrimination.

2. The temporal dimension of the establishment requirement

33. None the less, the information provided by the Unabhängiger Verwaltungssenat Wien is not sufficient to determine the exact content of the requirements under Austrian law for 'establishment'. In other words, it is unclear exactly how the requirements under Austrian law are to be satisfied, with the result that it is legitimate to ask whether, in its observations, the Commission refers to the same concept of establishment as the Austrian Government in its observations. In addition, the distinction between 'seat' and 'another establishment' is not irrelevant. The Austrian Government supports that claim in stating that non-Austrian companies have a certain advantage over Austrian companies since the latter may obtain a licence only by holding a 'seat' in Austria, whereas non-Austrian companies may also obtain a licence by holding an 'establishment' there.

34. Therefore, in the light of the insufficient information on those categories under Austrian law, it is for the national court to analyse the proportionality of the burdens imposed by Austrian law in order to hold a 'seat' or 'another establishment' there, on the basis of the admissibility threshold which I have outlined above in point 31 of this Opinion.

35. To my mind, a more nuanced answer is called for in relation to whether the Austrian legislation, as submitted to this court, requires applicants to satisfy the requirement of holding a seat or another establishment before knowing whether they have a real chance of obtaining a licence. Consequently, requiring an undertaking, from the outset, to hold a 'seat' or 'another establishment' as a pre-condition for obtaining a licence, when it cannot reliably assess the likelihood of its application's succeeding, constitutes a restriction of the freedom to establish an economic activity.

36. The vague nature of the purpose behind such a prior requirement appears to be a constant feature in the position adopted by the Austrian Government, even though the latter justifies the requirement of a seat or another establishment on the basis of creating a level playing field in terms of competition and ensuring the provisions of labour and social law (point 30 of its observations). It remains unclear, generally speaking, why the requirement of a seat or another establishment in

Austria is regarded as the only means of achieving the stated objective.

37. The significant investment which an undertaking has to make to open a permanent establishment — which may lead to nothing if the licence application is finally rejected — is unjustified in terms of proportionality, for all the stated objectives could be satisfied at the stage preceding the grant of the licence by alternative, less onerous means. For example, the authorities in the other Member States could provide information and guarantees which, furthermore, would be more reliable and rigorous than the equivalent which a recently established foreign company would be able to provide.

38. Therefore, I agree with the Commission that the requirement of a seat or another establishment can be justified on grounds of proportionality provided that the requirement relates to the point in time immediately before the activity is begun but not, by contrast, when such a seat or establishment constitutes a pre-requisite for the grant of a licence.

V — Analysis of the second question: the economic protection of the incumbent licence holder

39. Bearing in mind the above in relation to freedom to provide services, in analysing the second question I shall restrict myself to addressing the compatibility with freedom of establishment and free competition of the requirement making the grant of a licence subject to the preservation of the economic viability of the incumbent licence holder, which has, from the outset, raised doubts on the part of the Austrian Government as to the admissibility of the question.

A — *The plea of inadmissibility*

40. The Austrian Government's plea of inadmissibility in relation to the second question referred appears weak in that it claims that nobody at first instance discussed this as a possible ground for refusing a licence. In principle, it is clear that Yellow Cab was refused a licence for a very different reason from that now raised by the Unabhängiger Verwaltungssenat Wien; none the less, that court notes (in a certain preventative spirit) in the order for reference that it has full jurisdiction to deliver judgment in the case and also refers to the need to obtain an interpretation of European Union law which will be of practical use for it. In those circumstances, the Court of Justice is required to resolve the questions referred in line with the purpose of the action before the national court and not merely in a hypothetical manner. [26]

26 — Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38, Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 19.

B — *Analysis of the substance*

41. The justification of ensuring the economic viability of the incumbent licence holder must be supported by solid reasons relating to the public interest, based essentially on the proper functioning of the service at issue.

42. In that regard, Regulation 684/92, although not applicable here, may be of use for interpretation purposes. Where Article 7(4) thereof accepts as a reason for rejection of authorisation, in certain circumstances, the fact that the service in question would directly compromise the existence of regular services already authorised, it immediately states thereafter that the fact that 'an operator offers lower prices than are offered by other road or rail transporters or the fact that the link in question is already operated by other road or rail carriers may not in itself constitute justification for rejecting the application' (see, to that effect, Article 8(4) of Regulation 1073/2009).

43. In the end, the fact that the service applied for by those seeking to obtain a licence may compromise — by means of a mere reduction in profitability — the activity of the incumbent transport operator, constitutes an obvious displacement of the object of protection. It is clear that what is actually ensured is the profitability of the initial licence holder rather than the service itself. In conclusion, that specific provision on the profitability of an undertaking does not appear to be aimed at promoting tourism, rationalising and making road transport safer or protecting passengers.

44. The situation would be different if that reduction in profitability were to disrupt the service so far as to render it inoperative or compromise its viability, provided that, in addition, the initial conditions could not be compensated for (or, of course, improved) by the entry onto the market of a second licence holder. In that case, there might well be a reduction in the quality of transport to the detriment of passengers, as claimed by Austria in its observations (point 40 thereof), but that would require an assessment based on more detailed information.

45. So that the restriction on the freedom of establishment is not applied in an arbitrary manner by the national authorities, the criteria making it possible to limit that

restriction must be transparent, objective and known in advance. [27] Even though, in Austria's view, the assessment of the economic situation of the incumbent licence holder constitutes a prediction which needs to be made on the basis of sufficient findings of fact (see point 34 of its observations), in practice, it is assessed merely on the basis of the information and evidence provided by the incumbent licence holder, which is hardly in accordance with those criteria or, therefore, freedom of establishment.

46. In summary, the economic protection of the incumbent licence holder hinders the exercise of freedom of establishment where, as in this case, it is characterised by lack of precision as to its purpose and the criteria for its application.

VI — From the point of view of competition

47. Finally, in both its first and second questions the national court requests that a national provision such as the one at issue in this case be assessed in the light of Article 101 TFEU (competition). The Court's answer must, however, draw a distinction between the impact of that provision on the establishment requirement and its impact on the provision relating to the economic viability of the incumbent licence holder.

48. It should be pointed out, at the outset, that the Court's case-law appears to contradict the Commission's arguments relating to the lack of relevance of free competition which the Commission infers from the fact that the present case does not concern the conduct of undertakings and that no public undertaking is involved. Although in *Cipolla* [28] the Court recognised that Articles 81 EC and 82 EC (now Articles 101 TFEU and 102 TFEU) are concerned only with 'undertakings and not with laws or regulations emanating from Member States, those articles, read in conjunction with Article 10 EC [now Article 4(3) TFEU], which lays down a duty to cooperate, … require Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings' so that 'Articles 10 EC and 81 EC are infringed where a Member State requires or encourages the adoption of agreements, decisions or concerted practices

27 — As stated above; see the Court's judgments in Woningstichting Sint Servatius and Hartlauer, inter alia.

28 — Joined Cases C-94/04 and C-202/04 *Cipolla and Others* [2006] ECR I-11421, paragraphs 46 and 47, with reference to order in Case C-250/03 *Mauri* [2005] ECR I-1267, paragraphs 29 and 30.

contrary to Article 81 EC or reinforces their effects …'

49. Moving on to the substance, it needs to be pointed out that the argument relating to infringement of the rules on competition is raised with a very different degree of intensity in each of the two questions referred.

50. As regards the first question, the potential indirect consequences of infringement of freedom of establishment on free competition will always be examined in the context of the analysis of that right. That is to say that, in the present case, it is superfluous to assess the requirement of a seat from the point of view of competition also. [29]

51. The impact of Article 101 TFEU may be different from the point of view of the second question relating to the provision ensuring the economic viability of the incumbent licence holder. It is clear that an economic viability provision such as that laid down in the Austrian legislation, making the grant of authorisation subject to the condition that the incumbent licence holder remain profitable, almost inevitably has an impact on free competition. Of course, and as noted by the Commission, reasons relating to the public interest may, in certain cases, justify a clause safeguarding the economic interests of the incumbent licence holder as a means of ensuring the proper functioning of the service. However, no such special circumstances seem to be present in this case and, so, the absence of any restrictions in that regard is tantamount to favouring a given undertaking, even though another undertaking might be able to offer the service at a lower price or at the same price but with lower costs, thereby ultimately infringing the neutrality which competition requires. [30]

29 — In addition, irrespective of the fact that it is dubious, from the outset, that a tourist bus service satisfies the criteria enabling it to be classed as a service of general economic interest within the meaning of *Woningstichting Sint Servatius*, the claims based on that classification would be irrelevant in relation to establishment since the grant of special or exclusive rights to an undertaking is not at issue here, given that the fundamental element of the dispute is nothing more than the lawfulness of a series of restrictions in administrative proceedings relating to prior authorisation.

30 — In that regard, and said with the necessary level of caution, the fact that the sole incumbent holder appears to be made up of a group of various local companies operating in the tourism sector, as can be inferred from the decision to refer, does not exactly ease concerns in relation to the provision on economic viability from the point of view of free competition.

VII — Conclusion

52. In the light of the foregoing, I propose that the Court of Justice respond to the questions referred by declaring that:

1. Article 49 TFEU (freedom of establishment) precludes a rule of national law which, in order to authorise the operation of a tourist bus service in a city where fixed stops are called at regularly in accordance with a timetable, imposes as a requirement for authorisation that, before commencing operation of the tourist bus service and, in particular, on the date the licence is granted, the applicant undertaking hold a registered office or another establishment in the Member State of the authority granting authorisation.

2. Article 49 TFEU (freedom of establishment) does not prelude a rule of national law which, in order to authorise the operation of a tourist bus service in a city where fixed stops are called at regularly in accordance with a timetable, requires that the applicant undertaking hold, at the latest from the time the transport service begins operating, a seat or another establishment in the Member State of the authority granting authorisation.

3. Article 49 TFEU (freedom of establishment) and Article 101 TFEU (competition) preclude a rule of national law which, in order to authorise the operation of a tourist bus service in a city where fixed stops are called at regularly in accordance with a timetable, unconditionally prevents the grant of authorisation where, if the transport service applied for begins operating, the revenues of a competing undertaking running on a partly or entirely identical route will be so substantially

reduced by this service that the continued running of the service operated by the competing undertaking will no longer be economically viable.

4. Article 56 TFEU (freedom to provide services) is not applicable when analysing the compatibility with European Union law of a rule of national law which makes the authorisation of the operation of a tourist bus service in a city where fixed stops are called at regularly in accordance with a timetable subject to the conditions set out above.