Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 3 May 2018 [1]

Case C-249/17

Ryanair Ltd
v
The Revenue Commissioners

(Request for a preliminary ruling from the Supreme Court (Ireland))

(Reference for a preliminary ruling — Taxation — Common system of value added tax — Concept of taxable person — Expenditure for services procured in connection with the acquisition of an undertaking's entire share capital — Right of deduction — Unsuccessful takeover of a competitor)

I. Introduction

1. The focus in the present case is once again the interpretation of the concept of 'taxable person' and the definition of 'economic activity' within the meaning of Article 9(1) of the VAT Directive. [2] The proceedings will give the Court an opportunity to clarify the scope of its case-law on deduction of input tax by holding companies.

2. In 2006 the airline Ryanair made a bid to take over the Irish airline Aer Lingus. Although the takeover failed for reasons of competition law, Ryanair had already incurred considerable costs for consultancy and other services in connection with the planned takeover. Ryanair therefore claimed deduction of the input tax paid, which was refused by the Irish tax authorities.

3. It is recognised in the Court's case-law that deduction of input tax can also be claimed for abortive investments. However, the dispute arises in this instance because, according to case-law, the mere acquisition and holding of shares does not constitute economic activity within the meaning of the VAT Directive. Consequently, according to the Court's case-law, a holding company whose sole purpose is to acquire shares is not entitled to deduct input tax. [3]

1 Original language: German.

2 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

3 Judgments of 20 June 1991, *Polysar Investments Netherlands* (C-60/90, EU:C:1991:268, paragraph 17); of 14 November 2000, *Floridienne and Berginvest* (C-142/99, EU:C:2000:623, paragraph 17); and of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt* (C-108/14 and C-109/14, EU:C:2015:496, paragraph 20).

4. In contrast with the situation of a conventional holding company, however, in this case an operating undertaking (and thus a taxable person) sought to make a strategic takeover of a competitor. The question therefore arises whether the limitation of input tax deduction based on the case-law on holding companies [4] actually applies here, as the economic dimension of the case is addressed only if regard is had, in a functional analysis, to the importance of the acquisition of shares for the existing economic activity.

II. Legal framework

5. The framework of the case in EU law is provided by the rules of Sixth Council Directive 77/388/EEC [5] of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment ('the Sixth Directive'), as applicable in the taxation period in question. Those rules are substantively the same as the corresponding provisions of Directive 2006/112 ('the VAT Directive'). [6]

6. Article 9(1) of the VAT Directive (formerly Article 4(1) and (2) of the Sixth Directive) provides:

'1. "Taxable person" shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as "economic activity". The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity. …'

7. Under Article 167 of the VAT Directive, a right of deduction arises at the time the deductible tax becomes chargeable. Under Article 168 of that directive (both provisions being formerly regulated in Article 17 of the Sixth Directive):

'In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:

(a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person; …'

III. Facts, main proceedings and questions referred for a preliminary ruling

8. The appellant in the main proceedings, Ryanair Ltd ('Ryanair'), is a private airline established in Ireland. On 23 October 2006, Ryanair made a formal takeover bid with the aim of acquiring the entire share capital of Aer Lingus. Aer Lingus is a formerly State-owned airline from Ireland whose shares were quoted on the stock exchange on 2 October 2006 following privatisation in 2006.

4 Judgments of 27 September 2001, *Cibo Participations* (C-16/00, EU:C:2001:495, paragraph 21); of 29 October 2009, *AB SKF* (C-29/08, EU:C:2009:665, paragraph 30 et seq.); of 6 September 2012, *Portugal Telecom* (C-496/11, EU:C:2012:557, paragraph 34); and of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt* (C-108/14 and C-109/14, EU:C:2015:496, paragraph 21).

5 OJ 1997 L 145, p. 1.

6 With a view to a simpler form of citation reference will be made hereinafter to the provisions of the VAT Directive.

9. By decision of 27 June 2007, the European Commission declared that the concentration was incompatible with the common market.[7] For that reason, Ryanair was only able to acquire slightly less than 29% of the shares in Aer Lingus.

10. In connection with the takeover bid, Ryanair availed itself of services subject to VAT. Ryanair claimed that VAT as deductible input tax. However, this was refused by the Irish tax authorities (The Revenue Commissioners, the respondent in the main proceedings).

11. Ryanair first appealed against the negative decision to the Irish Tax Appeals Commission and then lodged an appeal with the Circuit Court. The Circuit Court made a binding finding of fact and referred to the Irish High Court, in a kind of national preliminary ruling procedure, the legal question whether there is a right to deduct under the circumstances of the main proceedings. The High Court also found that Ryanair was not entitled to deduct input tax.

12. Ryanair appealed against the decision of the High Court to the Irish Supreme Court. By order of 8 May 2017, received at the Court on 12 May 2017, the Supreme Court stayed its proceedings and referred the following questions to the Court for a preliminary ruling pursuant to Article 267 TFEU:

'(1) Can a future intention to provide management services to a takeover target, in the event that the takeover is successful, be sufficient to establish that the potential acquirer is engaged in economic activity for the purposes of Article 4 of the Sixth VAT Directive so that VAT charged to the potential acquirer on goods or services provided for the purposes of seeking to progress the relevant acquisition can potentially be considered as VAT on an input to the intended economic activity of providing such management services; and

(2) Can there be a sufficient "direct and immediate link", as identified as a requirement by the Court of Justice of the European Union [in the judgment of 27 September 2001, *Cibo Participations* (C-16/00, EU:C:2001:495)], between professional services rendered in the context of such a potential takeover and output, being the potential provision of management to the acquisition target in the event that the takeover is successful, so as to permit a deduction to be made in respect of the VAT payable on those professional services?'

13. In the proceedings before the Court, Ryanair, Ireland and the Commission submitted written observations. All the parties were represented at the hearing on 14 March 2018.

IV. Legal assessment

14. Both questions referred for a preliminary ruling concern the right of deduction for expenditure made in connection with the intended, but ultimately unsuccessful, acquisition of a company's entire share capital with a view to a takeover. They should therefore be answered together.

15. By the first question, the Supreme Court is essentially seeking to ascertain whether the acquiring company's intention to provide management services to the subsidiary, in the event that the takeover is successful, is sufficient to classify it as a taxable person within the meaning of the VAT Directive.

16. In essence, the Supreme Court is thus asking about the possibility of combining two lines of case-law. On the one hand, according to the case-law of the Court of Justice, a right to deduct also exists for abortive investments. In the case of costs incurred in the preparation of an economic activity, deduction of input tax can be claimed even where the economic activity is not taken up

7 Decision C(2007) 3104 of 27 June 2007 (Case COMP/M.4439). The action for annulment brought against that decision by Ryanair before the General Court was unsuccessful, see judgment of 6 July 2010, *Ryanair* v *Commission* (T-342/07, EU:T:2010:280).

successfully and the intended taxable transactions do not take place.[8] The only material factor is the taxable person's intention of engaging in an economic activity, which is to be proven by objective factors.[9] On the other hand, a holding company's economic activity, which is necessary for deduction of input tax according to case-law, may in particular consist in it providing management services to the company in which it has acquired a shareholding.[10]

17. By the second question, the Supreme Court would then like to ascertain whether there is the immediate and direct link necessary for deduction of input tax between the expenditure made in connection with the acquisition of shares in the company and the intended management services.

A. Background to the distinction between a financial holding company and an operating undertaking

18. The case-law on holding companies to which the Supreme Court refers in its first question was developed using the example of pure financial holding companies whose sole purpose is to acquire shares in other undertakings and which have no operating business of their own. Their sole income consists of dividends, which do not constitute remuneration for the economic use of property but are merely the result of ownership of a share.[11]

19. According to the Court's case-law, pure financial holding companies are not therefore — in the absence of additional remunerated management services, for example — to be regarded as a taxable person within the meaning of Article 9(1) of the VAT Directive[12] as they do not carry on an economic activity. Consequently, they also cannot claim a right of deduction under Article 168 of the directive.

20. Against this background, the Supreme Court asks the question whether this case-law also has a bearing on the present case, since Ryanair wished to acquire shares and did so, albeit to a smaller extent than planned.

21. There is no doubt that Ryanair is to be regarded fully as a taxable person within the meaning of the VAT Directive in respect of turnover from the airline business. The business objective of acquiring the shares is also immediately apparent. Through the takeover of a competitor, Ryanair wished to increase its turnover and presumably also to generate synergy and network effects.

22. Nevertheless, recognition of an economic activity and thus of deduction of input tax by virtue of the application of the case-law on holding companies depends primarily on whether Ryanair had the intention of providing remunerated management services to Aer Lingus (see under B). It would be completely immaterial in this regard, however, to what extent management services are to be supplied. The question therefore arises whether deductible input tax in respect of the costs for the acquisition of shares should not in fact be allocated (see under C), as, in addition to the turnover from management services, there could be much higher dividend income which does not in itself give entitlement to deduct input tax.

8 Judgments of 14 February 1985, *Rompelman* (268/83, EU:C:1985:74, paragraph 24); of 29 February 1996, *INZO* (C-110/94, EU:C:1996:67, paragraph 17); and of 22 October 2015, *Sveda* (C-126/14, EU:C:2015:712, paragraph 20).

9 See the recent judgment of 21 September 2017, *SMS group* (C-441/16, EU:C:2017:712, paragraph 46).

10 Judgments of 27 September 2001, *Cibo Participations* (C-16/00, EU:C:2001:495, paragraph 21); of 6 September 2012, *Portugal Telecom* (C-496/11, EU:C:2012:557, paragraph 34); and of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt* (C-108/14 and C-109/14, EU:C:2015:496, paragraph 21).

11 Judgments of 22 June 1993, *Sofitam* (C-333/91, EU:C:1993:261, paragraph 13); of 27 September 2001, *Cibo Participations* (C-16/00, EU:C:2001:495, paragraph 19); and of 6 September 2012, *Portugal Telecom* (C-496/11, EU:C:2012:557, paragraph 32).

12 Judgments of 20 June 1991, *Polysar Investments Netherlands* (C-60/90, EU:C:1991:268, paragraph 17); of 14 November 2000, *Floridienne and Berginvest* (C-142/99, EU:C:2000:623, paragraph 17); and of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt* (C-108/14 and C-109/14, EU:C:2015:496, paragraph 20).

23. However, neither the 'indirect route' of remunerated management services nor the resulting allocation problems in applying that solution are necessary if regard is had to a functional link between the acquisition of shares and the main operating business (see under D). Looking at the function of the planned takeover for the operating business, its costs are juxtaposed with the turnover from the operating business. Accordingly, the only material factor is the immediate and direct link between those turnovers (see under E).

24. Nevertheless, since the Supreme Court considers the case-law on holding companies to be applicable to the transaction at issue, I will first examine whether Ryanair would be entitled to deduct input tax on that basis.

B. Full input tax deduction according to the case-law on holding companies

25. As was stated above (point 18), the holding of a share alone does mean that an economic activity is considered to exist. On the other hand, the Court states in its settled case-law that the acquisition and holding of a share by a holding company does constitute an economic activity within the meaning of Article 9(1) of the VAT Directive where the shareholding is accompanied by direct or indirect involvement in the management of the target company.[13] Such involvement may, for example, consist in the supply of administrative, financial or commercial services to the target company.[14] However, this criterion is merely based on the fact that for a pure holding company to be recognised as a taxable person, there must additionally be activities which are subject to VAT by virtue of Articles 2 and 9 of the directive.[15]

26. This conclusion holds in a case like the present one — the Supreme Court asks about this expressly — even if the intended management services do not actually take place. For, in order to guarantee that the VAT system is fully neutral for the taxable person, a right of deduction must also exist for expenditure made in preparation for an economic activity.[16] The only crucial factor is the intention to commence an economic activity, supported by objective evidence.[17] This applies even if it is already known, when the first tax assessment is made, that the intended economic activity leading to taxable transactions will not actually be taken up.[18]

27. If the two lines of case-law mentioned by the Supreme Court are combined, recognition of Ryanair as a taxable person would therefore depend on whether it had the intention, when the services in question were used, to supply taxable management services to Aer Lingus in the event that the takeover was successful. This intention has been found by the Circuit Court with binding effect for the main proceedings. As the Commission stated at the hearing, the fact that the takeover bid actually failed, and no involvement in the management of Aer Lingus was and is therefore also possible, could not result in a subsequent exclusion of the right to deduct input tax.

13 Judgments of 20 June 1991, *Polysar Investments Netherlands* (C-60/90, EU:C:1991:268, paragraph 14); of 14 November 2000, *Floridienne and Berginvest* (C-142/99, EU:C:2000:623, paragraph 17); of 27 September 2001, *Cibo Participations* (C-16/00, EU:C:2001:495, paragraph 19); and of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt* (C-108/14 and C-109/14, EU:C:2015:496, paragraph 20).

14 Judgments of 27 September 2001, *Cibo Participations* (C-16/00, EU:C:2001:495, paragraph 21); of 6 September 2012, *Portugal Telecom* (C-496/11, EU:C:2012:557, paragraph 34); and of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt* (C-108/14 and C-109/14, EU:C:2015:496, paragraph 21).

15 Unremunerated ('mere') involvement is not therefore sufficient where there are additionally no taxable output transactions at all (see orders of 12 July 2001, *Welthgrove* (C-102/00, EU:C:2001:416, paragraph 16 et seq.), and of 12 January 2017, *MVM* (C-28/16, EU:C:2017:7, paragraph 34)).

16 Judgments of 14 February 1985, *Rompelman* (268/83, EU:C:1985:74, paragraph 23); of 8 June 2000, *Schloßstrasse* (C-396/98, EU:C:2000:303, paragraph 39); and of 22 October 2015, *Sveda* (C-126/14, EU:C:2015:712, paragraph 20).

17 Judgments of 14 February 1985, *Rompelman* (268/83, EU:C:1985:74, paragraph 24); of 8 June 2000, *Schloßstrasse* (C-396/98, EU:C:2000:303, paragraph 40); and of 21 September 2017, *SMS group* (C-441/16, EU:C:2017:712, paragraph 46).

18 Judgment of 8 June 2000, *Breitsohl* (C-400/98, EU:C:2000:304, paragraph 34 et seq.).

C. Limitation of input tax deduction in respect of a small management fee?

28. However, if regard is had solely to the provision of remunerated management services, this leads in practice to seemingly artificial constructions, as, according to the Court's case-law, the extent to which such remunerated management services are supplied is entirely irrelevant to entitlement to full input tax deduction.[19] Consequently, there are often large input tax surpluses, that is to say, a significant disproportion between the output transactions generated by management services and the deductible input tax claimed on the input transactions.

29. The Court's case-law therefore makes it possible for holding companies to claim a large input tax deduction on the acquisition of shares, provided only management services are supplied for remuneration — irrespective of the amount — to the company. For that reason, the Commission expressly proposed in the proceedings before the Court that input tax deduction be permitted in connection with the acquisition of shares only if proportionate to the output transactions generated by management services.

30. However, the question arises, in the next step, of the calculation of proportionality. A simple comparison of the values of the turnover from management services and from dividends neglects the fact that the holding of shares does not give rise to recurrent costs. Furthermore, the input tax surplus described above also exists only in the taxation period in which the acquisition of shares of a company occurs. If the management services are supplied for remuneration over a number of years, the situation is different. In addition, the problems of calculation are compounded in a case like this one, where the acquisition is merely planned. In these circumstances, a rough estimate at best could be made of potential dividend income.

31. Moreover, not every holding of shares in the case of a taxable person can necessarily lead to a non-economic activity alongside the operating business, as this is not compatible with the principle that VAT should be neutral.[20] On the basis of the Commission's approach, any taxable person who also holds shares could claim only proportionate input tax deduction in respect of its general management costs even if it is clear that those costs are incurred in connection with its economic activity,[21] as the holding of a share as such generates at most low costs and the amount of dividend income likewise does not depend on the other general costs.

32. Consequently, the Commission's view is not convincing.

D. Full input tax deduction on a functional analysis of the acquisition of shares

33. On the other hand, the abovementioned problems do not arise on a functional analysis which takes into account the taxable person's main operating business and has regard to the link between the acquisition of shares and that economic activity. In particular, the costs for the takeover are juxtaposed with the turnover from the operating business. Indeed, I take the view that such a functional analysis in cases like the present one follows from the Court's case-law.

19 See, to that effect, judgment of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt* (C-108/14 and C-109/14, EU:C:2015:496, paragraph 25), and Opinion of Advocate General Mazák in *Securenta* (C-437/06, EU:C:2007:777, point 30 et seq.).

20 With regard to this principle, see judgments of 22 June 1993, *Sofitam* (C-333/91, EU:C:1993:261, paragraph 10); of 26 May 2005, *Kretztechnik* (C-465/03, EU:C:2005:320, paragraph 33); and of 29 October 2009, *AB SKF* (C-29/08, EU:C:2009:665, paragraph 55). However, in *MVM*, unlike the present case, the link between the inputs and the operating business was in any case doubtful (see order of 12 January 2017, *MVM* (C-28/16, EU:C:2017:7, paragraph 39)).

21 In *MVM* the Court ruled that a mixed holding company which does not supply any taxable management services for its subsidiaries and additionally generates other turnover from its own operating business (leasing of power plants and fibre optic networks) may deduct input tax proportionately from the costs incurred by it in the procurement of consulting services only if they can be regarded as general costs for the operating branch of its business (see order of 12 January 2017, *MVM* (C-28/16, EU:C:2017:7, paragraph 46 et seq.)).

34. The situation, typical of a pure holding company, in which the supply of taxable management services is virtually a condition for assuming an economic activity, does not exist in cases like that in the main proceedings. For, as has been seen, Ryanair already carries on a commercial activity on the air transport market and generates turnover accordingly. Against this background, it seems artificial to have regard to the future provision of remunerated management services.

35. A functional analysis better addresses the economic dimension of the case. Although in this instance the takeover of a competitor is intended to be achieved by acquiring shares in the company, the case is much closer to the situation where an undertaking plans to buy up all of a competitor's physical equipment and facilities than to the situation where an undertaking wishes to purchase shares merely to generate dividends.

36. The consequence of such an approach — as the Commission also acknowledged at the hearing — would undoubtedly be that the acquirer would be entitled to full input tax deduction. This conclusion would follow from both the potentially applicable rules on the transfer of a business in general (Article 19(1) of the VAT Directive) and the normal rules. In the case of a full merger with the target company, deduction of input tax from the acquisition costs would likewise be out of the question. Limiting input tax deduction in the case of a 'mere' 100% shareholding would also call into question the principle of neutrality of legal form.

37. Consequently, according to the Court's case-law, direct involvement in management by supplying management services is certainly not the only case where the holding of a share can constitute an economic activity. Rather, the Court considers an economic activity to exist whenever the acquisition or holding of the share has a typical[22] business character. This is the case, for example, with commercial securities trading or if the acquisition or holding of shares constitutes a direct, permanent and necessary extension of a taxable activity.[23]

38. The strategic takeover of an undertaking by which the acquiring company pursues the aim of extending or modifying its operating business is to be regarded as such a direct, permanent and necessary extension of a taxable activity. Although such a takeover is accompanied by the acquisition of shares in the company, it constitutes a measure aimed at (extended) taxable turnover.

E. The link between the acquisition of shares and the turnover from the operating business

39. The question of the link between the costs incurred in connection with the acquisition of shares and the intended management services thus no longer arises.[24] On a functional analysis, it is instead a matter of the link between the acquisition of shares and the (intended) turnover from the operating airline business. With regard to this turnover there is no disproportion between the value of the deductible input tax and the output transactions, with the result that an allocation is also unnecessary.

22 See, with regard to the typological approach to economic activity within the meaning of Article 9(1) of the VAT Directive, my Opinion in *Posnania Investment* (C-36/16, EU:C:2017:134, point 25).

23 Judgments of 20 June 1996, *Wellcome Trust* (C-155/94, EU:C:1996:243, paragraph 35); of 6 February 1997, *Harnas & Helm* (C-80/95, EU:C:1997:56, paragraph 16); of 14 November 2000, *Floridienne and Berginvest* (C-142/99, EU:C:2000:623, paragraph 29); of 8 February 2007, *Investrand* (C-435/05, EU:C:2007:87, paragraphs 32/36); of 29 October 2009, *AB SKF* (C-29/08, EU:C:2009:665, paragraph 31); and of 30 May 2013, *X* (C-651/11, EU:C:2013:346, paragraph 52).

24 Moreover, the Court has expressly rejected a direct and immediate link between these transactions, see judgment of 27 September 2001, *Cibo Participations* (C-16/00, EU:C:2001:495, paragraph 32). The words used in the judgment of 29 October 2009, *AB SKF* (C-29/08, EU:C:2009:665, paragraph 64) are misleading in this regard. It is possible to claim as general costs, see judgments of 6 September 2012, *Portugal Telecom* (C-496/11, EU:C:2012:557, paragraph 37), and of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt* (C-108/14 and C-109/14, EU:C:2015:496, paragraph 25).

40. According to the Court's case-law, such expenditure has a direct and immediate link with certain output transactions which were a component of their cost.[25] In addition, it is possible to claim deduction of input tax for the undertaking's general costs which are components of the price of an undertaking's products.[26]

41. The expenditure made in connection with acquiring the shares of Aer Lingus undoubtedly constitutes components of the cost of the (intended) output transactions from the airline business following the takeover of Aer Lingus. These costs will also have to be factored into airfares somehow, if Ryanair is to operate profitably. Gaining control of Aer Lingus would have been the condition for improving overall business performance and thus for generating the intended output transactions with the parent company and the subsidiary. Such influence on the management of a competitor is possible only if the acquiring company holds the majority of the company's shares.

42. According to the Court's case-law — as has already been explained above (point 26) — the fact that the intended takeover and the ongoing operation of Aer Lingus under the full control of Ryanair was not actually realised has no bearing on this conclusion. Here too, the intention of engaging in economic activity, proven by objective factors, is sufficient.[27] That intention cannot be called into question subsequently on the ground that there was in fact no takeover of Aer Lingus.[28]

V. Conclusion

43. I therefore propose that the questions referred for a preliminary ruling be answered as follows:

(1) Under circumstances like those in the main proceedings (in the context of a strategic takeover for example), the acquisition of a company's entire share capital with the intention of thereby bringing about a direct, permanent and necessary extension of the taxable activity of the acquiring company constitutes an economic activity within the meaning of Article 4 of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (now Article 9(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax).

(2) Costs incurred by the acquiring company in connection with achieving such a strategic takeover have a direct and immediate link with its taxable activity with the result that the value added tax paid on that expenditure is to be deducted in accordance with that activity.

25 Judgments of 27 September 2001, *Cibo Participations* (C-16/00, EU:C:2001:495, paragraph 31); of 26 May 2005, *Kretztechnik* (C-465/03, EU:C:2005:320, paragraph 35); of 29 October 2009, *AB SKF* (C-29/08, EU:C:2009:665, paragraph 57); and of 17 October 2013, *Iberdrola and Others* (C-566/11, C-567/11, C-580/11, C-591/11, C-620/11 and C-640/11, EU:C:2013:660, paragraph 28).

26 Judgments of 27 September 2001, *Cibo Participations* (C-16/00, EU:C:2001:495, paragraph 33); of 26 May 2005, *Kretztechnik* (C-465/03, EU:C:2005:320, paragraph 37); of 6 September 2012, *Portugal Telecom* (C-496/11, EU:C:2012:557, paragraph 37); and of 17 October 2013, *Iberdrola and Others* (C-566/11, C-567/11, C-580/11, C-591/11, C-620/11 and C-640/11, EU:C:2013:660, paragraph 29).

27 See judgments of 14 February 1985, *Rompelman* (268/83, EU:C:1985:74, paragraph 24); of 29 February 1996, *INZO* (C-110/94, EU:C:1996:67, paragraph 17); of 22 October 2015, *Sveda* (C-126/14, EU:C:2015:712, paragraph 20); and of 21 September 2017, *SMS group* (C-441/16, EU:C:2017:712, paragraph 46).

28 The referring court also expressly observes that the question whether Ryanair's intention in this regard is proven by objective factors or whether the objective factors tend to rule out such an intention has been definitively clarified in the main proceedings. This was also underlined by all the parties at the hearing.