



The Portuguese State will have to pay compensation to the employees of TAP's former subsidiary, Air Atlantis

The Portuguese Supreme Court was obliged to seek a preliminary ruling from the Court of Justice on the concept of a “transfer of a business”

Directive 2001/23¹ provides that a “transfer” is considered to take place where there is a disposal of an economic entity which retains its identity and which has the objective of pursuing an economic activity, whether that activity is central or ancillary. The Directive applies to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger. The Directive provides that the transferor’s rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer are to be transferred to the transferee.

In February 1993, Air Atlantis (“AIA”), a company established in 1985 and operating in the charter flights market, was wound up. In the course of the winding up, Mr Ferreira da Silva e Brito and 96 other individuals were dismissed as part of a collective redundancy. From May 1993, TAP, the main shareholder in AIA, began operating some of the flights which AIA had contracted to provide over the period from 1 May to 31 October 1993. TAP also operated a number of charter flights, a market in which it had not previously been active, as the routes concerned had, until then, been served by AIA. In operating those flights, TAP used some of the equipment and assets which AIA had used for its business, in particular four aeroplanes. TAP also assumed responsibility for the leasing of those aircraft and took over AIA’s office equipment in Lisbon and Faro (Portugal), as well as other moveable property. In addition, TAP recruited a number of former AIA employees.

Mr Ferreira da Silva e Brito and the other 96 employees brought an action against the collective redundancy before the Tribunal do Trabalho de Lisboa (Lisbon Labour Court, Portugal). They sought reinstatement in TAP and payment of their remuneration. The Tribunal do Trabalho de Lisboa found that there had been a transfer of a business and ordered that the employees be reinstated in the corresponding grades and that they be paid compensation. Hearing the case on appeal, the Tribunal da Relação de Lisboa (Lisbon Court of Appeal) set aside the judgment given at first instance. The employees then brought an appeal in cassation before the Supremo Tribunal de Justiça (Portuguese Supreme Court), which, by a judgment given in 2009, held that the collective redundancy was not unlawful. That court held that the fact that a commercial activity is “merely continued” is not a sufficient ground for concluding that there has been a transfer of a business, since the business must also retain its identity. A number of the employees asked the Supremo Tribunal de Justiça to make a reference to the Court of Justice for a preliminary ruling but the Supremo Tribunal de Justiça considered that there was no material doubt as to the interpretation of EU law which would make such a reference necessary.

The employees then brought an action before the Varas Cíveis de Lisboa (Court of First Instance, Lisbon) for a declaration of non-contractual civil liability against the Portuguese State, claiming that the latter should be ordered to compensate them for certain material loss. They maintain that the

¹ Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ 2001 L 82, p. 16).

judgment of the Supremo Tribunal de Justiça is manifestly unlawful, since (i) it interprets incorrectly the concept of a “transfer of a business” within the meaning of the Directive and (ii) the Supremo Tribunal de Justiça failed to comply with its obligation to refer questions concerning the interpretation of EU law to the Court of Justice. The Varas Cíveis de Lisboa ask the Court (i) whether the concept of a “transfer of a business” within the meaning of the Directive covers the situation in which the AIA employees found themselves, (ii) whether the Supremo Tribunal de Justiça was obliged to refer a question to the Court concerning the interpretation of that concept and (iii) whether Portuguese law is contrary to EU law because it requires, as a condition for any claim for damages against the State, the prior setting aside of the decision that caused the loss or damage.

By today’s judgment, **the Court finds that the concept of a “transfer of a business” within the meaning of the Directive covers the situation in issue.**

The Court observes that in a situation which concerns the air transport sector, **the fact that equipment and assets are transferred must be regarded as a key factor for the purpose of determining whether there is a “transfer of a business” within the meaning of the Directive.** It also points out that TAP replaced AIA in the aircraft leasing contracts and actually used the aircraft concerned, which shows that it took over assets that were essential for pursuing the activity previously carried on by AIA. The Court also notes that a certain amount of other equipment was taken over. It adds that **what is relevant for the purpose of finding that the identity of the transferred entity has been preserved is the functional link of interdependence and complementarity between the various elements transferred.** The retention of a functional link of that kind between the various elements transferred allows the transferee to use them – even if they are integrated, after the transfer, in a new and different organisational structure – to pursue an identical or similar activity.

The Court also declares that, in order to avert the risk of an incorrect interpretation of EU law, **the Supremo Tribunal de Justiça was required to seek a preliminary ruling from the Court of Justice** on how the concept of a “transfer of a business” within the meaning of the Directive should be interpreted. The Court takes into account (i) that the Supremo Tribunal de Justiça is a court against whose decisions there is no judicial remedy under national law and (ii) the fact that there had been conflicting decisions of lower courts regarding the interpretation of that concept as well as frequent difficulties with its interpretation in the various Member States.

The Court finally rules that **EU law precludes a provision of national law which, like the Portuguese legislation, requires, as a condition for a declaration of State liability, the prior setting aside of the decision that caused the loss or damage, when such setting aside is, in practice, impossible.** The Court observes that a rule of national law of that kind may make it excessively difficult to obtain compensation for the loss or damage caused by an infringement of EU law, given that the situations in which decisions of the Supremo Tribunal de Justiça may be subject to review are extremely limited.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court’s decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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