



Press and Information

Court of Justice of the European Union

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Advocate General's Opinion in Case C-563/17
Associação Peço a Palavra and Others v Conselho de Ministros

Advocate General Campos Sánchez-Bordona proposes that the Court of Justice declare that the requirements of the Portuguese Government in relation to the reprivatisation of TAP constitute a justified restriction on the freedom of establishment, with the exception of the obligation to maintain and develop the national hub

The Associação Peço a Palavra ('I Want to be Heard Association') is a non-profit civic association that is opposed to the reprivatisation of the airline TAP Air Portugal (Transportes Aéreos Portugueses) SA ('TAP'). That association, together with four individuals, brought an administrative action before the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal) seeking annulment of the tender specifications approved by the Portuguese Government on 15 January 2015 in relation to that reprivatisation.

The process for the indirect reprivatisation of the share capital of TAP was to be carried out through what it terms 'a reference direct sale' (a direct sale to key long-term investors) of up to 61% of shares in the capital of TAP SGPS, SA ('TAP SGPS'; a holding company for the shares in TAP, the reprivatisation of which constitutes the subject matter of the proceedings) and an offer to sell up to 5% of the share capital of TAP SGPS to its employees. In addition, a put option was included in favour of the State, enabling it to transfer the remaining capital of TAP SGPS to the purchaser in the reference direct sale and to agree a call option with the purchaser, in accordance with the terms of the specifications for the transaction.

The abovementioned association and individuals claim that a number of the requirements contained in the tender specifications violate the freedom of establishment and the freedom to provide services enshrined in the Treaty on the Functioning of the European Union (TFEU). The Supremo Tribunal Administrativo decided to refer questions to the Court of Justice for a preliminary ruling since it has doubts as to the compatibility of those requirements with EU law, which relate, more specifically, to the requirement to maintain the company's headquarters and effective management in Portugal, the capacity to comply with public service obligations, and the commitment to maintain and develop the national hub.

In today's Opinion, Advocate General Manuel Campos Sánchez-Bordona takes the view, first, that **it is the freedom of establishment that is at issue**, given that the sale of shares representing up to 61% of the share capital of TAP SGPS would enable the acquirer to exercise definite and decisive influence over the management of that company and its subsidiary (TAP). Accordingly, in determining whether the clauses in the tender specifications are compatible with EU law, the relevant provisions are Articles 49 and 54 TFEU (freedom of establishment accorded to undertakings).

In those circumstances, **the Advocate General notes that, in his view, the three abovementioned requirements incorporate, in themselves, a restriction on the freedom of establishment**. The requirement that the company's headquarters and effective management remain in Portugal is clearly a restriction on the freedom of establishment. That applies likewise to the requirement to accept obligations under public law and the requirement to maintain the privatised company's hub in Portugal. According to the Advocate General, both those requirements

could dissuade a potential purchaser from acquiring the majority of the company's share capital given that to a large extent they predetermine subsequent business decisions.

Nevertheless, it is necessary to examine whether the requirements at issue may be justified under EU law and whether they are adequate and proportionate in the light of the intended objective.

The Advocate General examines, **in the first place, the requirement that the purchasing entity be capable of taking on public service obligations for the flight connections between the main national airports and the airports of the Portuguese autonomous regions and concludes that, in addition to being justified by overriding reasons of public interest, it is relevant and appropriate.**

In the second place, he is of the opinion that **the requirement that the company's headquarters and effective management remain in Portugal constitutes a necessary restriction on the freedom of establishment that is not disproportionate, provided it is essential in order to guarantee the air traffic rights recognised under bilateral agreements concluded by that Member State with other non-EU Member States with which it has particular historical, linguistic, cultural and social ties** (such as Angola, Brazil and Mozambique) where those agreements require the company that holds the corresponding operating licence to have the nationality of the signatory Member State. If the company were to move its headquarters to another State, contrary to the terms of those treaties, it could lose the licence and the corresponding traffic rights, which could very seriously undermine one of the fundamental elements of communication in the traditional relations of Portugal with the countries of the Lusitanian community of nations, which represent cultural and political assets of the first order for that Member State.

On the other hand, the Advocate General is of the opinion that the requirement to maintain and develop the national hub does not constitute a justified restriction on the freedom of establishment since it is linked to a purely economic objective, namely growth of the national economy.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

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 Opinion is published on the CURIA website on the day of delivery.

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