



Press and Information

Court of Justice of the European Union

PRESS RELEASE No 19/19

Luxembourg, 27 February 2019

Judgment in Case C-563/17

Associação Peço a Palavra and Others v Conselho de Ministros

The conditions set by the Portuguese Government for the reprivatisation of TAP are compatible with EU law with the exception of the requirement to maintain and develop the existing national hub

The Associação Peço a Palavra ('I Want to be Heard Association') is a non-profit making organisation subject to Portuguese law which has challenged the reprivatisation process of TAP — Transportes Aéreos Portugueses SA ('TAP'). That association brought an administrative action with four individuals before the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal) for the annulment of the tender specifications approved by the Portuguese Government in January 2015 in relation to that reprivatisation process. The indirect reprivatisation process of TAP's share capital was to be conducted, in particular, by means of a 'reference direct sale' (a direct sale to key long-term investors) of up to 61% of the shares in TAP SGPS SA (TAP's holding company).

The abovementioned association and individuals claim that certain requirements in the tender specifications infringe the freedom of establishment and freedom to provide services laid down 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 on the conformity with EU law of those requirements, namely that the company's headquarters and effective management be kept in Portugal, have the capabilities to comply with public service obligations and that the existing national hub be maintained and developed.

In today's judgment, **the Court rules that Article 49 TFEU (prohibition on restrictions of the freedom of establishment) does not preclude the first two of the abovementioned requirements. However, the requirement that the purchaser of the shares ensure that the existing national hub is maintained and developed constitutes an unjustified restriction of the freedom of establishment.**

First of all, as regards the requirement that the purchaser perform the public service obligations at issue, the Court notes that, according to the tender specifications, that requirement concerns the capacity to ensure compliance with TAP's public service obligations, including, where applicable, flight connections between the main national airports and the airports of the autonomous regions and the continuation and further development of the routes serving the autonomous regions, the diaspora and Portuguese-speaking countries and communities. In addition, Portugal has, in the past, imposed public service obligations on air carriers in respect of scheduled air connections between Portugal and its autonomous regions, such as the outermost regions of the Azores Islands or Madeira Island, of which compliance with the Regulation on the operation of air services¹ has not been called into question. Since that regulation introduced exhaustive harmonisation at the level of the EU in respect of public service obligations in the air carrier services industry, any national measure taken in that area must be assessed in the light of the provisions of that harmonising measure (the regulation) and not in the light of the provisions of

¹ 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).

primary law (the freedom of establishment laid down in Article 49 TFEU). The Court observes that it is clear from the regulation that public service obligations can be imposed by a Member State only on certain air routes within the European Union, in particular on those connecting an airport located in the EU with an airport in a peripheral region in its territory. The Court therefore considers that, in so far as the tender specifications merely require the new shareholder selected as a result of the reprivatisation process at issue to comply with potential public service obligations imposed on TAP in accordance with the substantive and procedural conditions laid down in the regulation, that national measure is in conformity with EU law, and there is no need to consider that measure in respect of primary law, in particular as regards the freedom of establishment.

However, given that the requirements concerning, on the one hand, keeping the headquarters and effective management in Portugal and, on the other, maintaining and developing the existing national hub do not relate to a field harmonised by the regulation, they must be assessed in the light of primary law, in particular the freedom of establishment. According to the Court, those requirements effectively constitute restrictions on the freedom of establishment, since they prohibit, impede or render less attractive the exercise of that freedom, in so far as they mean, for the purchaser, restrictions on the decision-making powers normally open to TAP SGPS's corporate bodies.

The Court then examines whether those conditions may be justified in the light of EU law. It considers that the need to safeguard the public interest service aimed at ensuring that there are sufficient scheduled air services to and from Portuguese-speaking third countries with which Portugal has particular historical, cultural and social ties (such as Angola, Mozambique or Brazil) constitutes an overriding reason in the public interest capable of justifying those measures.

The Court holds that the requirement relating to maintaining the company's headquarters and effective management in Portugal is proportionate to that overriding reason in the public interest, in so far as it is necessary in order to guarantee the air traffic rights conferred under bilateral agreements between that Member State and the abovementioned third countries. Those agreements subject, TAP's traffic rights for air routes with those countries to maintaining TAP's principal place of business in Portugal, which is to be verified by the Supremo Tribunal Administrativo. Moving TAP's headquarters outside of Portugal could also mean losing the validity of the operating licence and of the air operator certificate issued to TAP by the competent Portuguese authority, which would preclude the operation of all scheduled air route services — including those to and from the Portuguese-speaking third countries concerned — which form a substantial share of TAP's business. Moreover, the proportionality of that requirement is corroborated by the fact that that requirement does not preclude TAP from creating secondary establishments, such as branches or subsidiaries, outside of Portugal.

However, the Court considers that **the requirement to maintain and develop the existing national hub goes beyond what is necessary to attain the intended objective of ties with the Portuguese-speaking third countries concerned.**

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.

Unofficial document for media use, not binding on the Court of Justice.

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

Press contact: Jacques René Zammit 📞 (+352) 4303 3355