

## Publications

# GDP Provides support for the definition of “minimum services” in the Air Transport Industry

Copyright by: GDP ADVOGADOS ASSOCIADOS

Author: Francisco Alves Dias



Several unions in the air transport sector have decided to organize and carry out a workers strike to oppose recent government measures. Such workers strike was to include the non-performance of several daily tasks required to maintain all air services within the main carriers in Portugal and, specifically, the flight connections to the islands of Azores, which are usually performed by the Portuguese carrier “SATA” and its branch “SATA Internacional”, together with TAP, the Portuguese flag carrier, under a Public Service Obligation.

Due to the lack of agreement to which services should be kept during the strike period as minimum services and the fact that the company at hand belongs to the Public Economical Sector, in accordance with section b), number 4 of article 538.<sup>o</sup> of the Portuguese Labor Code, the matter was subject to an arbitration decision by “CES - Conselho Económico e Social”.

## The CES - Conselho Económico e Social decision

It was the competency of this arbitrary court to define which services had to be kept as minimum transport services even during the period of strike. As a constitutionally protected right, the workers right to strike, is however limited in the Portuguese Constitution by the need for the workers on strike to guarantee the performance of minimum services in order to guarantee the satisfaction of imperative social needs. It is the existence of such imperative social needs, and the quantification of such needs that was up to the arbitration council to decide. Specifically, if SATA workers were

obliged to guarantee all flights between mainland and the islands, or if not all, which ones.

In deciding the terms of what are the government social needs, the final decision incorporated a concept which was presented by GDP to the members of the CES Council. It follows from our understanding and advice, that minimum air transport services should take in consideration, when public service obligations exist, the number of flights incorporated in such public service obligations following a specific reasoning.

Public Service Obligations (PSO) in Air Transport exist to suppress a failure in a liberalised market on a specific route. That is to say, a PSO are a government instrument to assure that an essential service is maintained in a liberalised market where the economical agents by themselves have no interest in providing for such service and thus, the state intervention is allowed and considered not to distort competition.

The element of “essentiality” can be considered in a different array of forms, such as the services proportion to the level of development expected to the serviced area, and the user needs for mobility within the national territory.

That said, when the PSO were first attributed, the government had previously analysed the user needs of a specific reason for air transport, comparable modes of transportation, cost and efficiency of such other modes of transportation. In sum, it has first detected a market inefficiency, secondly, analysed the people needs for air transport in such route and, finally, decided to support the performance of what it considers to be the optimum services in such a route to tackle the peripheral difficulties of the islands.

While the PSO's are being performed, and upon a workers strike arbitration for minimum services, we consider that, although coming from different perspectives on the performance of the referred flights, both concepts reach the same need for definition, that is, what is the concrete weight of the concept of minimum services and minimum intervention on the market. At such point, our position as given to CES is that the PSO's have to be considered when defining minimum services for the workers strike, and that they should work as a maximum limit of services. That is to say, when the State has, in a certain point in time, decided what are the proportional services to be provided in a specific route, it cannot, at a second moment in time, decide that the minimum services during a workers strike is equal, or superior, to such proportionate service.