



# THE IMPACT OF THE OWNERSHIP STRUCTURE OF THE COMPANY MANAGING AN AIRPORT ON ITS FUNCTIONING

— dr Alina Sperka-Cieciura

University of Łódź, Poland

ORCID: 0000-0002-6604-5493

email: [alinasperka@gmail.com](mailto:alinasperka@gmail.com)

## ABSTRACT

This article tackles the problem of the ownership structure of the enterprises managing airports. The process of privatization of certain airports that has recently been conducted in France provoked a discussion about the possible effects of this process. The critical report of the Court of Auditors (Cour des Comptes), published after the privatization of the airports in Toulouse, Nice and Lyon, as well as the strong opposition to the privatization of Group ADP (managing the airports in Paris), leads to the conclusion that it is necessary to verify if the legal measures adopted in European Union's and national legal systems are efficient and adequate to ensure the proper functioning of airports after privatization.

## KEYWORDS

fair competition, ownership structure, privatization, airport infrastructure, national public service

## INTRODUCTION

The changes in the ownership structure of enterprises owned by state or public entities always provoke a rich political and social debate. The discussion is even more intense when it comes to companies managing the important infrastructure of national or local character, and it is surely the case of the privatization of companies managing the airports. This is the reason why it is crucial to conduct a profound legal research to analyse if the changes to the ownership structures of the aforementioned companies pose a risk of creating the infringements mentioned in these discussions (safety hazards, non-realisation of public interest, violation of fair competition rules). Currently, the aviation market is changing

dramatically, there are several parallel processes of privatization ongoing in Europe, and the latest literature in this field is insufficient.

## **1. PRIVATIZATION OF GROUP ADP IN FRANCE**

Recently in France, we can observe a firestorm of debate about the privatization of Group ADP (ex-Aéroports de Paris), which in 2018 was the world's biggest aviation enterprise (with 281 million passengers and profits of 610 million Euros). The main French airports (Roissy-Charles-de-Gaulle, Orly, Le Bourget) belong to this group, as well as many other airports throughout the world (in Zagreb, Santiago, Amman, Maurice etc.). It has also shares in Group TAV, which owns airports in Istanbul, Antalya, Izmir and many others. When, in May 2019 the Parliament adopted the act providing for its privatization<sup>1</sup> the storm began.

### **1.1. THE MAIN ARGUMENTS AGAINST THE PRIVATIZATION OF GROUP ADP**

The discussion is so tempestuous because of a few reasons. First of all, Group ADP is a major player in the aviation sector and contributes its high profits to the budget. Even the infrastructure connected with the airports, such as boutiques and other services, brought in profit of 1 billion Euros in 2018. It has also extended into digital technologies through Hub One. Secondly, it is the biggest real estate owner in France, with 6686 hectares of grounds and more than one million square meters of buildings.<sup>2</sup> Moreover, it is claimed that Group ADP operates under natural monopoly conditions, which pose a risk of creating a cartel. This may also lead to discrimination against certain air carriers and pose a threat to fair competition rules. Considering the fact that Paris' airports, attended yearly by 100 million passengers, are the first border of France, it is claimed that international migration's control processes may be influenced by this privatization.

### **1.2. THE QUESTION OF THE NATIONAL PUBLIC SERVICE PROVIDED BY GROUP ADP**

Question of the national public service provided by state owned enterprises is also part of a broader discussion, which takes place whenever a government decides to pursue a process of privatization. From both sides of the political divide they will be accused of 'selling the crown jewels'. But actually, when it comes to Group ADP, it was created as public establishment (*établissement public*) Aéroports de Paris and was transformed into a public

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1 Loi n° 2019-486 du 22 mai 2019 relative à la croissance et la transformation des entreprises [Act n° 2019-486 of 22 May 2019 relating to the growth and transformation of companies] [2019] JORF n°0119.

2 More information on the webpage of ADP group: <<https://www.parisaeroport.fr/groupe/groupe-et-strategie/notre-groupe/parisvousaime>> accessed 1 Dec 2019.

limited liability company (*société anonyme*) in 2005 and as such, its shares began trading on the Paris Bourse in 2006, so in fact it has been partially privatized for many years.<sup>3</sup>

The legal act providing for the privatization of Group ADP was the subject of an examination by the Constitutional Court (Conseil Constitutionnel) due to the argument that it was incompatible with the 9th paragraph of the Preamble to the 1946 French Constitution which states: *All property and all enterprises that have or that may acquire the character of a public service or de facto monopoly shall become the property of society.*

The Constitutional Court ruled that Group ADP does not have the characteristics of a national public service within the meaning of the 9th paragraph of the Preamble to the 1946 French Constitution. Moreover, the Constitutional Court referred to its consistent case-law that even though the need for certain national public services derives from constitutional principles or rules, the determination of status for others is left to the discretion of the legislator or the regulatory authority, who can determine their relevance at a national level. The Constitutional Court highlighted that no provision currently in force qualifies Group ADP as a national public service.<sup>4</sup> Given these reasons, the Constitutional Court considered that the provisions of the 9th paragraph of the Preamble to the 1946 French Constitution do not prevent the transfer to the private sector of the majority of the shareholding of Group ADP.

### **1.3. THE QUESTION OF OPERATING IN THE CONDITION OF A DE FACTO MONOPOLY**

The Constitutional Court's decision claimed that the act is compatible with the 9th paragraph of the Preamble to the 1946 French Constitution<sup>5</sup> and called into question that Group ADP is operating in conditions of a monopoly. According to the Court's decision, although Group ADP largely dominates the French airport sector, it faces increasing competition from the main regional airports and the major European airport connection hubs. Importantly, the transport market in which Group ADP operates includes routes which could be substituted by several modes of transport, and on certain routes it competes with road and railway transport, particularly the latter due to the development of high-speed train lines.

### **1.4. THE PROPOSITION OF A REFERENDUM**

Finally, the opponents of the privatization of Group ADP (248 parliamentarians - 130 deputies and 118 senators) voted in favour of a referendum on the adoption of a legal

3 Ibid.

4 Décision n°2019-781 DC Loi relative à la croissance et la transformation numérique des entreprises Dossier documentaire [Decision n° 2019-781 DC Act relating to the growth and digital transformation of companies Documentary file], points 49-51 <[https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank\\_mm/decisions/2019781dc/2019781dc\\_doc.pdf](https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/decisions/2019781dc/2019781dc_doc.pdf)> accessed 1 Dec 2019.

5 G Teboul, G Conac, X Prétot, *Le préambule de la Constitution de 1946. Histoire, analyse et commentaires* [The preamble to the Constitution of 1946. History, analysis and comments] (Daloz-Sirey 2001) 22.

act (*référéndum d'initiative partagée*, called RIP) guaranteeing that the service provided by certain airports managed by ADP (Paris-Charles-de-Gaulle, Paris-Orly et de Paris-Le Bourget) will be considered as national public services.<sup>6</sup>

## 2. NEGATIVE EXPERIENCES WITH PREVIOUSLY CONDUCTED PRIVATIZATIONS

This discussion may be a negative side-effect from the privatization of the enterprises managing the airports in Toulouse, Nice and Lyon, which was harshly criticised by the Court of Auditors (Cour des Comptes) in its report<sup>7</sup>. The report was adopted three years after the transfer of 49.9% of the shares of the Toulouse-Blagnac airport to the Chinese Consortium Symbiose, and two years after the sale of 60% of Nice-Côte d'Azur and Lyon airports to Consortiums managed by Vinci and the Italian Group Atlantia. Selling a majority of shares to the Chinese-controlled Consortium Symbiose was especially controversial, due to the lack of financial transparency and its links with Chinese public authorities<sup>8</sup>. The report also highlighted the influence the minister of economy and French Civil Aviation Authority (Direction générale de l'aviation civile, DGAC) were put under by the United Arab Emirates<sup>9</sup> after the privatization of the airports in Nice and Lyon.

## 3. LEGAL FRAMEWORKS AND THE MECHANISM FOR ENSURING THE PROPER FUNCTIONING OF THE AIRPORTS

The arguments raised in this discussion, especially the question of public national service provided by certain airports lead us to a broader problem of the legal frameworks in which the airports are functioning. It raises the question of whether provisions in European and national laws give an effective and sufficient mechanism for ensuring the realisation of public national service and other critical missions carried out by the airports. Moreover, it should be analysed which means, in law or in fact, are at the disposal of local and national authorities in case of infringement of the previously mentioned obligations.

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6 Proposition de loi présentée en application de l'article 11 de la Constitution visant à affirmer le caractère de service public national de l'exploitation des aéroports de Paris, [Proposal presented in application of article 11 of the Constitution aiming at affirming the character of national public service of the operation of the aerodromes of Paris], Assemblée Nationale n°1867. Constitution du 4 Octobre 1958 Quinzième Législature. Enregistré à la Présidence de l'Assemblée nationale le 10 avril 2019 <[http://www.assemblee-nationale.fr/dyn/15/textes/115b1867\\_proposition-loi](http://www.assemblee-nationale.fr/dyn/15/textes/115b1867_proposition-loi)> accessed 1 Dec 2019.

7 Cour des comptes, Le processus de privatisation des aéroports de Toulouse, Lyon et Nice, Communication à la commission des finances, de l'économie générale et du contrôle budgétaire de l'Assemblée nationale, Cour des Comptes, Octobre 2018 [The privatization process of the airports of Toulouse, Lyon and Nice. Communication to the Committee on Finance, General Economy and Budgetary Control of the National Assembly, Court of Auditors, October 2018] <<https://www.ccomptes.fr/system/files/2018-11/20181113-processus-privatisation-aeroports-Toulouse-Lyon-Nice.pdf>> accessed 1 Dec 2019.

8 Ibid 8.

9 Ibid 60.

### **3.1. INTERNATIONAL REGULATION OF THE AVIATION MARKET**

The development of a complex structure of international economic regulations, caused by more and more intensive international relations in aviation, resulted in many multilateral and thousands of bilateral agreements in that field. However uniformity across the laws on commercial air transport has not yet been obtained. There is currently no international framework, either under the World Trade Organisation or under the International Civil Aviation Organisation which governs competition among air carriers. The harmonization of international aviation law has generally embraced the problems of air safety, but is still very limited when it comes to economic issues and competition. European Union Member States rely mostly on bilateral and multilateral air service agreements (ASAs) which regulate the operation of international air services. However, they are not homogeneous in their content, and not all of them contain a so-called fair competition clause.

### **3.2. EUROPEAN UNION REGULATION OF AVIATION MARKET**

The European Union is taking steps to promote common rules on aviation, and in 2017 the ‘Open and Connected Aviation’ package was adopted.<sup>10</sup>

When it comes to aviation law and the question of aviation infrastructure, the European Union perspective focuses strongly on competition law and the question of equal access to the aviation market. Due to the growing imbalance between expansion of the air transport system in Europe and the availability of adequate airport infrastructure to meet that demand, the question of availability of neutral, transparent and non-discriminatory rules seems to dominate the discussion. The second important point of the discussion is providing protection for the European Union’s undertakings against unfair competition from air carriers operating from third countries.

#### **3.2.1. ENSURING ACCESS TO THE AVIATION MARKET FOR NEW AIR CARRIERS**

The liberalization of air transport caused an increase in new air carriers. The dominance of national carriers, whose position was strengthened for a long time by their monopolistic status, had restricted access to the main airports’ infrastructure. This growing imbalance between the expansion of the air transport system in Europe and the availability of adequate airport infrastructure to meet that demand resulted in an increasing number of congested airports within the European Community and finally led to the adoption of Council Regulation (EEC) 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports.<sup>11</sup>

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10 More information: ‘An Aviation Strategy for Europe’ (European Commission 2015-2018) <[https://ec.europa.eu/transport/modes/air/aviation-strategy\\_en](https://ec.europa.eu/transport/modes/air/aviation-strategy_en)> accessed 1 Dec 2019.

11 Regulation (EEC) 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports [1993] OJ UE L 14/1.

According to its provisions, the allocation of slots at congested airports should be based on neutral, transparent and non-discriminatory rules. The aim of this regulation was to allow new entrants into the Community market, without infringement of existing rights, and with the maintenance of adequate domestic air services to regions of the Member State concerned.<sup>12</sup>

### **3.2.2. LICENCES AS A WAY TO ENSURE THE PROPER FUNCTIONING OF THE AVIATION MARKET**

According to Art. 3 of Regulation 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 (Recast)<sup>13</sup>, every undertaking established in the Community has to obtain the appropriate operating licence in order to provide a service carrying passengers, mail and/or cargo by air for remuneration.<sup>14</sup> According to Art. 4 of the aforementioned regulation, to obtain a licence, the undertaking has to be owned and effectively controlled, whether directly or indirectly through one or more intermediate undertakings, by a Member State or nationals of Member States holding more than 50% of the controlling interest, and shall be effectively controlled by it. Exceptionally, other undertakings (from a third country) can be granted a licence, according to the agreement of which the Community is a party.<sup>15</sup>

It is advisable to check the functioning of this kind of agreement in order to answer the question of how the ownership structure of an airport may influence the realization of the given provisions, and in what way.

### **3.2.3. TRANSPARENCY OF FUNCTIONING OF GROUND HANDLING SERVICES**

When it comes to the ground handling services which are an essential element of the proper functioning of air transport, there are regulations adopted to provide transparency. The managing body of the airport is restricted in its actions by provisions of Council Directive 96/67/EC of 15 October 1996 on access to the ground handling market at airports within the Community. The aim of this act was to provide for opening up access to the ground handling market, which was bound to reduce the operating costs of airline companies and improve the quality of service provided to airport users. In order to make sure that the ground handling undertaking is independent from the managing body of the airport and from the dominant carrier, Directive 96/67/EC states that at least one of the suppliers should ultimately be independent of both the managing body of the airport and the dominant carrier.<sup>16</sup>

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12 Ibid.

13 Regulation 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 (Recast) [2008] OJ UE L 293/3.

14 Ibid.

15 Ibid.

16 Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community

### **3.2.4. THE EUROPEAN UNION'S REGULATIONS AND THIRD-COUNTRIES UNDERTAKINGS**

The rights recognized by Directive 96/67/EC and by the Regulation 1008/2008 should only apply to third-country undertakings if the rule of strict reciprocity is respected. If there is no such reciprocity, the Member State should be able to suspend these rights with regard to those undertakings. The similar treatment of the entities from third countries was also provided by other regulations and is also visible in foreign transport policy realized by the European Commission.<sup>17</sup>

### **3.2.5. PROTECTION OF INTRA-COMMUNITY ENTERPRISES AGAINST THE UNFAIR PRACTICES OF NON-COMMUNITY ENTERPRISES OPERATING IN THE AVIATION MARKET**

To avoid the threat that the competitive position of Community air carriers, constrained by the competition rules of the single market, could be adversely affected by unfair and discriminatory practices of non-Community air carriers providing similar services, Regulation (EU) 2019/712 of the European Parliament and of the Council of 17 April 2019 on safeguarding competition in air transport, and repealing Regulation (EC) No 868/2004<sup>18</sup> which was introduced in place of Regulation 868/2004 of the European Parliament and of the Council of 21 April 2004 concerning protection against subsidisation and unfair pricing practices causing injury to Community air carriers in the supply of air services from countries not members of the European Community was introduced.<sup>19</sup>

This Regulation aims to provide efficient protection of all European Union air carriers (equal and based on uniform criteria and procedures) against injury or threat of injury caused by practices distorting competition, adopted by third countries or third-country entities.

### **FINAL REMARKS**

It is essential to identify what kind of services provided by airports can, and should, be regarded as these of public and national interest. What is more, it should be specified if it is possible to define a universal catalogue of public national services provided by

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airports [1996] OJ UE L 272/36.

17 A Kunert-Diallo, *Dostęp do rynku i konkurencja w transporcie lotniczym w UE i regulacjach krajowych* [Market access and competition in air transport in the EU law and national regulations] (Wolters Kluwer 2018) 215.

18 Regulation (EU) 2019/712 of the European Parliament and of the Council of 17 April 2019 on safeguarding competition in air transport, and repealing Regulation (EC) No 868/2004 [2019] OJ UE L 123/4.

19 Regulation 868/2004 of the European Parliament and of the Council of 21 April 2004 concerning protection against subsidisation and unfair pricing practices causing injury to Community air carriers in the supply of air services from countries not members of the European Community [2004] OJ UE L 162/1.

airports, or should it be considered *ad casum*. Finally, the means at the disposal of local, national and European authorities should be analysed as a way of providing an effective and efficient mechanism for dealing with a case of infringement of the aforementioned rules. The last issue that should be taken into consideration is the origin of the entity that acquires share control package the company managing the airport. May the country of origin of this entity be considered essential for further management and functioning of the transferred airport, as it was in case of the Chinese Consortium Symbiose which had taken over control of Toulouse-Blagnac airport? We should pay special attention to the investors from Middle and Far East Countries, since in those countries the links between businesses and public authorities are very tight. The European Union's law focuses on the issues of fair competition rules, and most of the legal provisions regulating the relations between public and private enterprises emphasise compliance with the transparency rules which aim to prevent violation of competition law. It should be confirmed if the regulation provided by these legal acts ensures there are effective and sufficient measures at the disposal of local, national and European Union authorities when they deal with extra-Community entities.

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