

ECJ Rules on Compatibility of Rules on Liability of Foreign Parent Companies with Freedom of Establishment

On 20 June 2013, the Court of Justice of the European Union ruled in *Impacto Azul Lda v. BPSA 9 and Bouygues* on whether national legislation which precludes the application of the principle of the joint and several liability of parent companies vis-à-vis the creditors of their subsidiaries to parent companies having their seat in the territory of another Member State is contrary to the European freedom of establishment.

The Case

On 28 July 2006, Portuguese corporations *Impacto Azul* and *BPSA 9* concluded a promissory contract for sale and purchase ('the contract') under which *Impacto Azul* promised to sell a new building to *BPSA 9* and the latter undertook to purchase it. According to *Impacto Azul*, *BPSA 9* did not fulfil its contractual obligations. *BPSA 9* was 100% owned by *SGPS*, which also had its seat in Portugal, and which was, in turn, wholly controlled by the French company *Bouygues Immobilier*, the parent company that managed all of the companies that formed the group. Owing to the economic crisis and unfavourable market conditions, *Bouygues Immobilier* decided to withdraw from the project thereby causing *Impacto Azul* to suffer losses caused by that withdrawal.

Following an attempt to reach an amicable settlement of the dispute with *BPSA 9*, *Impacto Azul* brought before the *Tribunal Judicial de Braga* (District Court of Braga) an action for damages against that company for non-performance of the contract and claimed, inter alia, that the breach of contract was attributable primarily to *SGPS* and to *Bouygues Immobilier*, as parent companies, in accordance with the joint and several liability of parent companies for the obligations of their subsidiaries under Portuguese law.

The defendants contended that joint and several liability of parent companies did not apply to parent companies having their seat in another Member State under

Portuguese law. Bouygues Immobilier having its seat in France, it could not therefore be held liable vis-à-vis the creditors of BPSA 9.

Since that exclusion leads to a difference in treatment between parent companies having their seat in Portugal and parent companies having their seat in another Member State, Impacto Azul alleged an infringement of Article 49 TFEU.

The Judgment

Is the Portuguese legislation a restriction to the European freedom of establishment?

35 It should be pointed out that, having regard to the fact that the rules concerning corporate groups are not harmonised at European Union level, the Member States remain, in principle, competent to determine the law applicable to a debt of a related company. Thus, Portuguese law provides for the joint and several liability of parent companies vis-à-vis the creditors of their subsidiaries, only in respect of parent companies having their seat in Portugal. As the Commission correctly points out, in circumstances such as those at issue in the main proceedings, it is not contrary to Article 49 TFEU that a Member State may legitimately improve the treatment of claims of groups present on its territory (see, by analogy, Case 237/82 Jongeneel Kaas and Others [1984] ECR 483, paragraph 20).

36 Indeed, exclusion of the application of rules such as those in Article 501 of the CSC to undertakings established in another Member State, pursuant to the rules set out in Article 481(2) of the CSC, is not such as to make less attractive the exercise, by parent companies having their seat in another Member State, of the freedom of establishment guaranteed by the Treaty.

37 In any event, parent companies having their seat in a Member State other than the Portuguese Republic may choose to adopt, through contractual means, a system of joint and several liability for the debts of their subsidiaries.

Final Ruling:

Article 49 TFEU must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which excludes the application of the principle of the joint and several liability of parent companies vis-à-vis the

creditors of their subsidiaries to parent companies having their seat in the territory of another Member State.