



Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

20 June 2013 *

(Freedom of establishment — Restrictions — Joint and several liability of parent companies vis-à-vis the creditors of their subsidiaries — Exclusion of parent companies having their seat in another Member State — No restriction)

In Case C-186/12,

REQUEST for a preliminary ruling under Article 267 TFUE, from the Tribunal Judicial de Braga (Portugal), made by decision of 14 March 2012, received at the Court on 23 April 2012, in the proceedings

Impacto Azul Lda

v

BPSA 9 – Promoção e Desenvolvimento de Investimentos Imobiliários SA,

Bouygues Imobiliária – SGPS Lda,

Bouygues Immobilier SA,

Aniceto Fernandes Viegas,

Óscar Cabanez Rodriguez,

THE COURT (Ninth Chamber),

composed of J. Malenovský, President of the Chamber, U. Løhmus (Rapporteur) and A. Prechal, Judges,

Advocate General: M. Wathelet,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Impacto Azul Lda, by B. Faria and A. Coelho Rocha, advogados,
- BPSA 9 - Promoção e Desenvolvimento de Investimentos Imobiliários SA, by M. Marques Mendes, P. Vilarinho Pires and A. Dias Henriques, advogados,

* Language of the case: Portuguese.

— the Portuguese Government, by L. Inez Fernandes and C. Antunes, acting as Agents,
— the European Commission, by P. Guerra e Andrade and I. Rogalski, acting as Agents,
having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 49 TFEU.
- 2 The request has been made in proceedings between Impacto Azul Lda ('Impacto Azul') and BPSA 9 - Promoção e Desenvolvimento de Investimentos Imobiliários SA ('BPSA 9'), Bouygues Imobiliária – SGPS Lda ('SGPS') and Bouygues Immobilier SA ('Bouygues Immobilier'), or, in the alternative, A. Fernandes Viegas and Ó. Cabanez Rodriguez, concerning the non-performance by BPSA 9 of a contract concluded with Impacto Azul.

Portuguese law

- 3 Article 481 of Title VI of the Code on Commercial Companies (Código das Sociedades Comerciais, 'the CSC') provides: 'Ambit of this title

1. This title shall apply to relations between limited liability companies, limited companies and partnerships limited by shares.

2. This title shall apply only to companies having their seat in Portugal ...

...'

- 4 Article 482 of the CSC is worded as follows:

'For the purposes of this law, the following shall be regarded as related companies:

...

(c) companies in a control relationship;

(d) companies in a group relationship.'

- 5 It is clear from Articles 488, 489, 492 and 493 of the CSC that two companies are in a group relationship when one has total control over the other (pre-existing or subsequent), the fact that one of them was established before the other or vice versa being of no importance, or when, as independent companies, they agree to put themselves under a unitary and joint management (group of equals), or when, whether it is dependent or independent, one company entrusts the other with the management of its activities (relationship of subordination).

- 6 Article 491 of the CSC provides:

'The provisions in Articles 501 to 504 and those applicable pursuant to those articles shall apply to groups structured with total control.'

7 Under Article 501 of the CSC:

- ‘1. The parent company shall assume the obligations of the subsidiary, entered into before or after the conclusion of the agreement conferring control, until the expiry of that agreement.
2. The parent company may not be required to assume [the obligations mentioned above] before the expiry of a period of 30 days from the date of default by the subsidiary.
3. An enforcement order against the subsidiary may not be enforced against the parent company.’

The dispute in the main proceedings and the question referred for a preliminary ruling

- 8 Impacto Azul is a Portuguese limited liability company whose economic activity is, inter alia, the purchase and sale of buildings. BPSA 9, SGPS and Bouygues Immobilier formed part of the international property development group Bouygues and formed de facto a group with a relationship of total control, within the meaning of Articles 488 and 489 of the CSC. Thus, the Portuguese company 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.
- 9 On 28 July 2006, 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. 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.
- 10 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.
- 11 In those proceedings, Impacto Azul 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, as provided for in Article 501 of the CSC, read in conjunction with Article 491 of the code.
- 12 It is apparent from the order for reference that the defendants in the main proceedings contended, firstly, that Bouygues Immobilier did not wholly control the companies BPSA 9 and SGPS, such control being a fundamental, formal precondition for the application of the statutory rules on corporate group liability laid down in Article 491 of the CSC, and secondly, that the rules laid down in Article 501 of the CSC were not applicable in the present case in view of Article 481(2) of the code, which precludes the application of those rules to parent companies having their seat in another Member State. Bouygues Immobilier having its seat in France, it could not therefore be held liable vis-à-vis the creditors of BPSA 9.
- 13 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 has alleged an infringement of Article 49 TFEU.
- 14 The referring court is uncertain whether the Portuguese legislation at issue is compatible with European Union law and takes the view that the resolution of the dispute before it turns on the interpretation of that law.

- 15 In those circumstances, the Tribunal Judicial de Braga decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

‘Is it contrary to [European Union] law, in particular Article 49 TFEU, as interpreted by the Court of Justice of the [European Union], for the application of the rules in Article 501 of the CSC to undertakings having their seat in another Member State to be excluded pursuant to the rules contained in Article 481(2) of the CSC?’

The jurisdiction of the Court and the admissibility of the request for a preliminary ruling

- 16 BPSA 9 raises, as a preliminary point, the question of the Court’s jurisdiction to give a ruling on Article 49 TFEU, on the ground that the dispute in the main proceedings relates to a purely internal situation, and the question of the admissibility of the request for a preliminary ruling, in particular because the relevance of the question referred to the resolution of that dispute is not obvious.
- 17 As regards the argument that the dispute in the main proceedings relates to a purely internal situation, it is for the Court to assess whether it has jurisdiction to rule on the interpretation of the provision in question (see, to that effect, Case C-380/05 *Centro Europa 7* [2008] ECR I-349, paragraph 64; Case C-384/08 *Attanasio Group* [2010] ECR I-2055, paragraph 22; and Case C-245/09 *Omalet* [2010] ECR I-13771, paragraph 10).
- 18 The Court has declined jurisdiction where it was obvious that the provision of European Union law referred to the Court for interpretation was incapable of applying (Case C-567/07 *Woningstichting Sint Servatius* [2009] ECR I-9021, paragraph 43, and *Omalet*, paragraph 11).
- 19 According to settled case-law, the provisions of the TFEU on freedom of establishment do not apply to a situation, all the elements of which are confined within one single Member State (see, to that effect, Joined Cases C-54/88, C-91/88 and C-14/89 *Nino and Others* [1990] ECR I-3537, paragraph 11; Case C-134/94 *Esso Española* [1995] ECR I-4223, paragraph 17; and Case C-389/05 *Commission v France* [2008] ECR I-5397, paragraph 49).
- 20 It is true that the order for reference shows that Impacto Azul, BPSA 9 and SGPS have their seats in Portugal and that the applicability of the legislation at issue in the main proceedings is limited to that Member State. However, the fact that Bouygues Immobilier is the parent company established in France makes it possible, generally, to identify a cross-border element and, consequently, also the necessary prerequisite to invoking the freedoms of movement guaranteed by the Treaty. Accordingly, the question cannot be regarded as relating to a purely internal situation, as contended by BPSA 9.
- 21 The Court therefore has jurisdiction to examine that question.
- 22 So far as concerns the admissibility of the request for a preliminary ruling, BPSA 9 contends that the question referred is irrelevant, if not hypothetical, and that the referring court has failed to provide sufficient factual and legal material to determine whether interpretation of Article 49 TFEU is necessary for the purposes of resolving the case in the main proceedings.
- 23 Firstly, BPSA 9 contends that it is irrelevant whether Article 501 of the CSC is consistent with Article 49 TFEU inasmuch as, having regard to the Portuguese law applicable in the present case, the three companies in question do not form a group structured with total control. It would seem that the national court has not yet ruled on this matter.

- 24 Secondly, BPSA 9 contends that it follows from the application of Article 491, in conjunction with Article 501(2) of the CSC, that a parent company may not be required to assume the obligations of its subsidiary before the expiry of a period of 30 days from the date of default by the subsidiary, and that period was not observed.
- 25 According to BPSA 9, it follows that, whatever the location of its seat, Bouygues Immobilier may not be held liable in the case in the main proceedings.
- 26 According to settled case-law, the procedure provided for in Article 267 TFEU is an instrument of cooperation between the Court and the national courts, by means of which the former provides the latter with the points of interpretation of European Union law which they need in order to decide the disputes before them (see, inter alia, Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 22; Case C-445/06 *Danske Slagterier* [2009] ECR I-2119, paragraph 65; and Case C-307/10 *The Chartered Institute of Patent Attorneys* [2012] ECR, paragraph 31).
- 27 In the context of that cooperation, questions concerning European Union law enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of European Union law that is sought is unrelated to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual and legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, Joined Cases C-94/04 and C-202/04 *Cipolla and Others* [2006] ECR I-11421, paragraph 25; Joined Cases C-570/07 and C-571/07 *Blanco Pérez and Chao Gómez* [2010] ECR I-4629, paragraph 36; and *The Chartered Institute of Patent Attorneys*, paragraph 32 and the case-law cited).
- 28 However, that is not so in the present case. Whilst it is true that the order for reference provides the Court with factual and legal material in a concise manner, the fact remains that that material bears a clear relation to the subject-matter of the dispute in the main proceedings and makes it possible to ascertain, as is apparent from paragraphs 8 to 13 of this judgment, the scope of the question referred for a preliminary ruling and the context in which it was referred. Likewise, the order states clearly the reasons which led the referring court to take the view that an interpretation of Article 49 TFEU was necessary to enable it to give judgment.
- 29 Furthermore, it does not appear that the interpretation of European Union law requested is unrelated to the issue raised in the dispute in the main proceedings, which is whether or not the French company Bouygues Immobilier may be held to be liable vis-à-vis the creditors of BPSA 9.
- 30 It follows from the foregoing that the request for a preliminary ruling is admissible.

The question referred for a preliminary ruling

- 31 By its question, the referring court asks, in essence, whether Article 49 TFEU precludes national legislation, such as that at issue in the main proceedings, 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.
- 32 It should be stated at the outset that freedom of establishment includes, for companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the European Union, the right to pursue their activities in other Member States through a subsidiary, a branch or an agency (Case C-471/04 *Keller Holding* [2006] ECR I-2107, paragraph 29; Case C-414/06 *Lidl Belgium* [2008] ECR I-3601, paragraph 18; and Case C-418/07 *Papillon* [2008] ECR I-8947, paragraph 15).

- 33 Article 49 TFEU requires the abolition of restrictions of the freedom of establishment. The provisions of the Treaty on freedom of establishment are aimed, according to their wording, at ensuring the benefit of national treatment in the host Member State. Moreover, according to settled case-law, Article 49 TFEU precludes any national measure which, even if applicable without discrimination on grounds of nationality, is liable to hinder or render less attractive the exercise by European Union nationals of the freedom of establishment that is guaranteed by the Treaty (see, to that effect, Case C-371/10 *National Grid Indus* [2011] ECR I-12273, paragraphs 35 and 36, and Case C-84/11 *Susisalo and Others* [2012] ECR, paragraph 31).
- 34 In accordance with the Portuguese legislation at issue in the main proceedings, the rules on joint and several liability of parent companies for the debts of their Portuguese subsidiaries do not apply to parent companies having their seat in another Member State. Therefore, it is necessary to consider whether such legislation constitutes a restriction within the meaning of Article 49 TFEU.
- 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.
- 38 Therefore, it must be held, so far as concerns the treatment accorded to parent companies established in Member States other than the Portuguese Republic, that national legislation such as that at issue in the main proceedings does not constitute a restriction of the freedom of establishment within the meaning of Article 49 TFEU.
- 39 In view of the foregoing, the answer to the question referred is that 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.

Costs

- 40 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Ninth Chamber) hereby rules:

1. **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.**

[Signatures]