

Joint and several liability of a foreign controlling company for unpaid employment entitlements to employees of a subsidiary in Portugal

This firm is honored of having succeeded in an appeal adjudicated by the Portuguese Constitutional Court which is considered as an historical decision. The Constitutional Court declared inconsistent with the Constitution the interpretation of sections 334 of Portuguese Employment Code and 481 (2) of the Companies Code which provide for that a foreign based company that control, wholly owned or cross-holding interests in a Portuguese company, is not jointly and severally liable for unpaid employees' entitlements of their Portuguese subsidiary.

In this context, it is of importance to note that according to Portuguese law, confirmed by the case law of the Constitutional Court any controlling company or, under certain conditions, a company of the same group or a company with crossed share interests can be found liable, under certain conditions, for the payment of entitlements of its Portuguese subsidiary's employees.

Adversely the Constitutional Court ruled that, under a general principle of equality and non discrimination and regardless of the foreign company's law (that is, the law of the company's main place of administration or registered office), the connection between the foreign company's activity in Portugal and the Portuguese jurisdiction is strong enough to justify the application of this general principle of equality and non discrimination, thus setting out that the same level of protection is already given to Portuguese employees of companies whose shareholders are also Portuguese resident companies. The same regime of Portuguese companies whose shareholders may not be based in Portugal.

Specifically in the case under consideration, the foreign based company (located in Germany) holds a 99% shareholding interest in a Portuguese subsidiary. A few years ago, the Portuguese subsidiary became insolvent and the employees' entitlements were put at risk. Consequently, a legal action was filed against the German parent company claiming due payment of the outstanding employee's entitlements based on the ground that the limitation to the Portuguese territory derived from sections 334 of the Portuguese Employment Code and 481 (2) of the Companies Code was unconstitutional. The first instance Court ruled in favour of the existence of such unconstitutionality as claimed by the employee and such conclusion of this court has just now been confirmed by the Constitutional Court.

This is a groundbreaking decision which in practice not only provides the employees with potential new ways of obtaining the satisfaction of their employment entitlements, but, furthermore, should be understood as a warning for companies with subsidiaries in Portugal or planning to set up subsidiaries in Portugal, in particular where the Portuguese entity is or shall be under control of a foreign based company.

Manuel P. Barrocas