

**EMPLOYMENT AND LABOUR**

# Liability for employment credits in international groups

Judgment no. 272/2021

Following the decisions in several specific cases, the Constitutional Court has declared, with mandatory and general force, the unconstitutionality of the joint interpretation of the rules contained in article 334 of the Employment Code and article 481(2) of the Commercial Companies Code. The rules the Constitutional Court held to be unconstitutional are the ones that excuse a company based outside Portugal that is in a reciprocal shareholding, control or group relationship with a Portuguese company from joint and several liability for the debts arising from the latter's relationships with its employees or from the termination of those relationships (employment credits).

It is widely known that article 334 of the Employment Code establishes the joint and several liability of companies which, as the employer, are in a reciprocal shareholding, control or group relationship with a Portuguese company, for any debts arising from employee relationships established with the latter, or from their breach or termination, that are overdue for more than three months. This measure extends the financial guarantee of employees, who can now claim what is owed to them from their employer or from another company that is in one of the situations described in article 481. However, this rule establishes a geographical limitation in that it only applies to companies based in Portugal. Therefore, the possibility for employees to claim employment credits that are overdue for more than three months was subject to the company or companies of the group also being based in Portugal.

This interpretation had already been tested in several cases of employees' claims and had consistently been rejected by the Constitutional Court<sup>1</sup>.

**"The Constitutional Court has declared, with mandatory and general force, the unconstitutionality of the joint interpretation of the rules contained in article 334 of the Employment Code and article 481(2) of the Commercial Companies Code."**

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<sup>1</sup> Judgment no. 227/2015, of the 1st Section, in Summary Decision no. 363/2015 of the 1st Section, and Summary Decision no. 434/2019 of the 1st Section.

The aim of this decision was to confirm the understanding expressed in previous judgments. In it, the Constitutional Court definitively resolves the question raised by holding that the view that employees of a company incorporated under Portuguese law can only claim employment credits that are overdue for more than three months from a company that is in a reciprocal shareholding, control or group relationship with the employer provided this company is based in Portugal is unconstitutional.

To reach this conclusion, the Constitutional Court carried out a comparison between an employee of an employer that is part of a Portuguese group and an employee of an employer that is part of a foreign group. It found that the former had a greater financial guarantee than the latter because the latter was not allowed to claim debts from companies in the group based in other countries. The Constitutional Court ultimately held that there is an unjustified treatment of the positions of the two groups of employees and, because this treatment is unfounded and arbitrary, it violates the constitutional principle of equality.

The judgment in question was not supported by all the judges and those dissenting pointed out important issues in their dissenting judgments. Those issues included:

- The solution of the joint and several liability of group companies based in the European Union for employment credits that have been overdue for more than three months arises from the joint application of the above article 334 of the Employment Code and the Treaty of Rome I, which abolishes the geographical limitation.
- The legal solution enshrined in the judgment will not be accepted in territories outside the European Union, within which there is some connection between the various legal systems. Indeed, laws are manifestations of national sovereignty. It is unrealistic to think that an employee of a Portuguese subsidiary of a group from a third state outside the European Union will succeed in enforcing a judgment of a Portuguese court in the state where it has its seat, whose courts will refuse to apply Portuguese law.
- Furthermore, in such a scenario, the invoked inequality between employees of groups based within the European Union and employees of groups based outside it is not resolved.

**"The employees of a company incorporated under Portuguese law can only claim employment credits that are overdue for more than three months from a company that is in a reciprocal shareholding, control or group relationship with the employer provided this company is based in Portugal is unconstitutional."**

**"The companies of the same group that are jointly and severally liable are often also employers."**

In addition to the above points, companies of the same group that are jointly and severally liable are often also employers. By allowing the employees of another company of the same group to attack the assets of the company that is liable, the employees of the latter see their own financial security reduced, or possibly even nullified, and their jobs potentially put at risk. However, from a perspective of equality of positions, we find it difficult to reconcile the view that the rights of some employees prevail over those

of others. This example becomes even more striking if we consider that, as often happens, the group company owns the share capital of the Portuguese subsidiary merely for reasons of geographical proximity and has little or no involvement in the specific management of the Portuguese company. It may also be focused on a different area of activity. In this scenario, does it make sense for a foreign company – and indirectly its employees – to be subject to joint and several liability that may partially or completely endanger its assets?

The Constitutional Court judgment answers this question in the affirmative. It remains to be seen what the courts of other jurisdictions will do if and when they are called upon to decide on specific disputes that may arise and whether they accept the application of Portuguese law to companies with no connection to the Portuguese State. ■