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# Corporate Groups and EU law

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# Aim of the presentation

- To present:
  - different concepts of corporate group law
  - key legislative initiatives of the EU in the area
  - the issue of under-harmonisation and its reflections to FE
  - the repercussions of Brexit
  - perspectives of development

# Introduction

- The EU hosts 10 out of 50 world's largest companies (Forbes 2000 Global 2018 list)
- All 10 of them are multi-national corporate groups
- Various industries
- **Multi-jurisdictions**

# Concepts

- The UK
  - general regime of civil/company law – no autonomous corporate group law
  - Similar in Sweden, Italy
- German model
  - autonomous body of law
- In some countries regulated within tax law, banking law, labour law, accounting, competition law

# Clash of concepts

- German *Konzernrecht* as “protective” law
  - protection of minority shareholders and daughter companies’ creditors
- Anglosaxon model - more business oriented
  - Group law should **enable** simpler governance over a corporate group



**Is there a need for a common  
framework for corporate groups?**

# Proposal for a Ninth Directive 1984

- Lack of comprehensive legal system on corporate group law in the MS
- Inspired by German concept of “control” , “domination” based on control contracts or de facto control
- Not familiar to other countries
- no directive was issued

# Forum Europaeum - 1990s

- Principles for a European Corporate Group Law
- Primacy of regulatory powers of MS
  - EU intervention only if regulatory barriers would burden functioning of the Internal Market
  - **subsidiarity principle**



# Action Plan 2003

- *no need to revive the draft 9th Directive*
- Sectoral approach

# Reflection Group 2011

- recognition of “group interest” at EU level via **recommendation**
- “group interest” seen as right and obligation of a parent company to govern the group and its subsidiaries in line with overall **group interest**
  - Tautology!

# Action Plan 2012

- **And once again:** “the idea of a comprehensive legal framework covering groups of companies was met with caution”
- Need for **more simplified communication of a group’s structure** to investors
- Move towards **recognition of the concept of “group interest”**

# Informal Company Law Expert Group 2014

## – some remarks

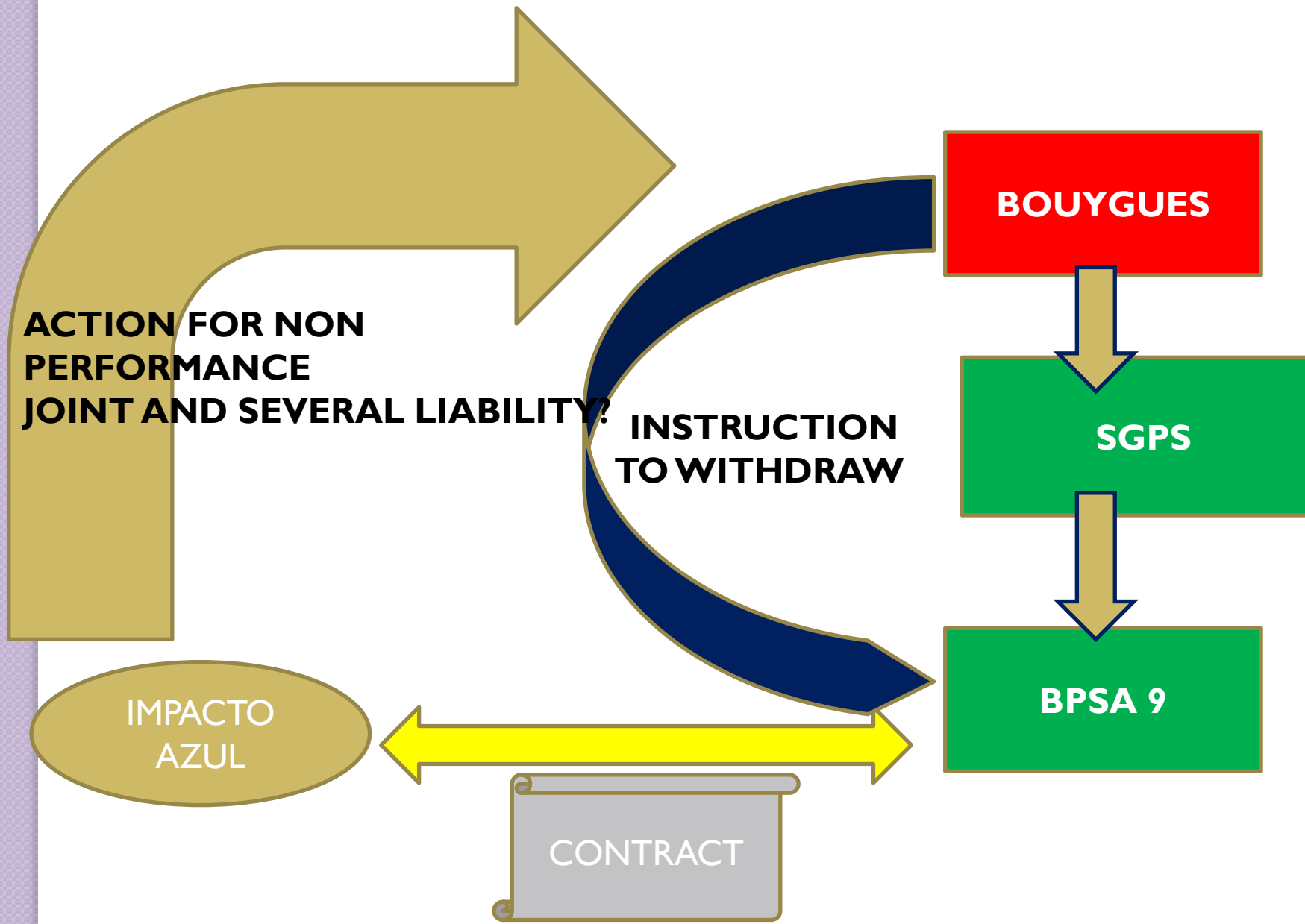
- Protective vs. enabling law
  - Differences among MS concerning the role of group law
- Recognition of group interest
  - Different approaches and theories
- Comprehensive vs sectoral approach to group law
  - Problem of „EU” corporate group law: no overall support to establishment of comprehensive legal framework, only partial solutions (see Winter Report, 2002)
  - Via insolvency law, Directive on SUP, accounting directs, banking directs, competition law...

# Remarks

- National oriented group law
- Many ideas, poor realisation
- Reluctancy of MS to introduce comprehensive legal framework
- Sectoral approach, soft law solutions, inconsistencies
- Transparency as the key leitmotif

# Cross-border groups and FE

Case 186/12 *Impacto Azul*



**BOUYGUES**

**SGPS**

**BPSA 9**

**IMPACTO AZUL**

**CONTRACT**

**ACTION FOR NON PERFORMANCE JOINT AND SEVERAL LIABILITY?**

**INSTRUCTION TO WITHDRAW**

# Scope of application

- Main issue: Portuguese rules on corporate group liability applicable only to parent companies having its seat in Portugal
- Bouygues had its seat in France and therefore **could not be liable** vis á vis BPSA 9 creditors!



- Is it contrary to Art 49 TFEU to exclude application of rules on corporate group liability to undertakings having their seat in another MS?

Different treatment of parent companies having their seats abroad to detriment of Portuguese creditors

# CJEU

- “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.**”

# No infringement!

- CJEU held that Portuguese exclusion **does not render** less attractive the exercise of the FE by parent companies having their seat in another MS,
- Parent companies can establish a system of joint and several liability through **contractual** means

## Again, reluctance to intervene in specific national approach to corporate group liability

- CJEU clearly left for the MS to decide how their corporate group law should be
- Additional safeguards for local creditors should be established by private treaty scheme

VIGILANTIBUS IURA: SCENT  
OF ANGLOSAXON MODEL?

# Rome I

- Does not apply to „questions governed by the law of companies..., such as ... **internal organisation ...**, and **the personal liability of officers and members as such for the obligations of the company ...**

## Rome II

- Does not apply to „non-contractual obligations arising out of the law of companies ..., internal organisation ..., the **personal liability** of officers and **members as such for the obligations of the company** ...;

# But, ...

- Art. 49(2) TFEU:

Freedom of establishment shall include the right to ...set up and **manage undertakings, in particular companies** or firms within the meaning of the second paragraph of Article 54, **under the conditions laid down for its own nationals by the law of the country where such establishment is effected, ...**

- Art. 54 (1) TFEU:

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 Union shall**, for the purposes of this Chapter, **be treated in the same way as natural persons who are nationals of Member States.**

# Different outlook – different results

- Does the fact that local subsidiaries cannot “count” on joint liability of their parent companies (often responsible for bad business results!) make position of local subsidiaries *ex ante* weak towards potential creditors?
- Different treatment is also a matter of competition among local and foreign companies!
- Would different approach encourage integration of small companies into pan-European corporate groups and thus contribute to cross-border business?
- Restricted territorial scope of application of national law prevents companies from other MS to enjoy **other benefits** of national group law!



# Finally: Brexit and EU company law


- As of March 30, 2019 EU company law will no longer apply to the UK
- EU rules on free movement of persons will cease to apply as well
- The UK – “third country”

# Repercussions

- **Consequence:**
  - Sector-specific harmonisation instruments will cease to apply
  - Different companies within a “UK corporate group” will be governed by different national laws
    - Strengthening the role of IPL



# Perspectives

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- Further reluctance to introduce (hard) law measures
  - Key regulatory area: group insolvency
    - atomistic vs. consolidated approach
    - Accent on inter-procedural cooperation
  - weakened “common law element” a chance for introducing an EU-wide instrument on corporate groups based on “protective element” and “dominance”?