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NEW LEGAL REGIME ON INDIVIDUAL RESTRICTIVE TRADE PRACTICES

On the 27th November 2013, Decree-Law no. 166/2013, adopting the new legal regime applicable to individual restrictive trade practices was published in the Official Journal.

The new legislation revokes previous Decree-Law no. 370/93 of 29 October[(1)]. Nineteen years later, the legislator felt the need to revise the previous regime, considering on the one hand, that the constraints that led to its adoption remained, and on the other, that in some cases those constraints changed due to developments in commercial practices.

The new legal regime applies only to companies established in national territory, excluding from its scope *(i)* the services of general economic interest; *(ii)* the purchase and sale of goods and supply of services, in so far as they are subject to sectorial regulation, particularly the financial, postal, transport, electronic communications and energy sectors; and *(iii)* the purchase and sale of goods or services with origin or destination in a country not belonging to the European Union or the European Economic Area (without prejudice of the provisions of paragraph 1 of Article 4 of the new Act, concerning the obligation to provide sales charts when requested).

The new Act enters into force 60 days after its publication – on the 25th February 2014 – and all supply contracts in force on this date shall be deemed terminated within a maximum period of twelve months, unless they are reviewed and put in conformity with the new legal regime within that time frame. Contractual provisions which are not in conformity with the new regime are null and void. This means that contracts that fall within the scope of the new legislation should be reviewed and adapted within the mentioned time limit.

Among the changes introduced by the new Act, the following stand out as most significant:

1. Clarification of the Sale at a Loss Regime

Important changes were introduced regarding the sale at a loss legal regime. In particular, the legislator sought to clarify what is meant in this context by actual purchase price, in order to facilitate its interpretation and supervision, taking into account, among other elements, deferred discounts (*e.g.*, rappel) when they are determinable at the time of the issuance of the respective invoice.

[(1)] Which was changed twice: by Decree-Law No. 140/98, of 16 May and by Decree-Law No. 10/2003, of 18 January.

It is now clear that the determination of the sale price of a particular product takes into account the discounts granted to that same product, even when they consist on the assignment of a right to compensation in a subsequent acquisition of equivalent goods or any other goods - which are imputed to the quantity sold of the same product by the same supplier for the past 30 days.

In this context, the Act established in addition a set of standards relating to invoices, including their respective issuance, complaint, acceptance, remedy, and rectification.

Moreover, the goods whose price is aligned by the price charged for the same goods by another economic operator of the same branch of activity which temporally and spatially competes effectively with the author of the alignment cease to be an exception regarding the application of the sale at a loss regime.

2. Refusal to Sell Goods or to Provide Services and Articulation with Decree-Law no. 92/2010 of 26 July

The new Article 6 adds to the previous list of justifiable grounds for refusing to sell goods or provide services, three new situations: *(i)* the protection of intellectual property; *(ii)* existing restrictions under European Union and International law, in particular for the repression and combating of crime and terrorism; and *(iii)* abnormal difficulties to sell or provide for reasons of *force majeure*, in particular as a result of war, strike, lock-outs, riots, civil commotions, robberies, hijackings, sabotage, terrorism, acts of vandalism, civilian or military uprisings, assaults or natural phenomena of a catastrophic and unpredictable nature.

The occurrence of any other circumstance associated with the concrete conditions of the transaction that, according to the normal uses of the respective activity, would make the sale of the good or the provision of the service abnormally detrimental to seller is now extended to the buyer.

In this context, the new regime safeguards Article 19 of Decree-Law no. 92/2010 of 26 July, which establishes the principles and rules on the simplification of free access to and exercise of services activities in national territory, and which implemented Directive 2006/123/EC of the European Parliament and of the Council, 12 December 1970 on services in the internal market, in the Portuguese legal order. This provision establishes the principle of non-discrimination of recipients of services on the grounds of their nationality, their place of residence or headquarters. In this context, the general conditions on the provision of the service defined by the service provider cannot be discriminatory on the basis of the nationality, place of residence or the headquarters of the recipient of said service, except if the differentiation is directly justified by objective criteria.

3. Densification of the Concept of Abusive Commercial Practices

The new regime establishes a list of negotiating practices among undertakings which are prohibited, with the aim of putting an end to the vagueness and uncertainty of the previous concept of abusive negotiating practices based on the idea of "exorbitant conditions" regarding the general conditions of sale.

Thus, the new Article 7 expressly identifies some practices which are deemed to be abusive[2], such as the introduction of retroactive changes to contracts. Said provision further includes a list of prohibited practices in the agro-food sector, when the supplier is either a micro or small undertaking, an organization or a cooperative[3].

4. The Strengthening the Sanctions Framework

The sanctions framework for infringement of the new legal regime was strengthened through the aggravation of the amounts of fines, the possibility of adoption of interim measures and the application of penalty payments.

The fines may currently vary between € 250 and € 20,000 for offences committed by individuals; between € 500 and € 50,000 if committed by micro-undertakings; € 750 and € 150,000 if committed by small undertakings; € 1,000 and € 450,000 if committed by medium-sized undertakings; and € 2,500 and € 2,500,000 if committed by large companies.

Whenever there are strong indications of its occurrence (even if only attempted), the supervisory authority may determine, as a matter of urgency and without the need to hear interested parties, the suspension of a restrictive practice likely to cause serious injury to other undertakings, which is difficult or impossible to repair.

In addition, if the offender fails to comply with a decision requiring the adoption of interim measures the competent authority may impose a penalty payment. This penalty is fixed on the basis of criteria of reasonableness and proportionality, taking into account the turnover of the offender in the previous calendar year and the negative impact caused on the market and on consumers by the infringement. The daily amount of this penalty may vary between € 2,000 and € 50,000. Additionally, the amounts may be increased for each day the infringement remains, although they cannot exceed, cumulatively *(i)* a maximum period of thirty days; and *(ii)* the accumulative maximum amount of € 1,500,000.

5. Transfer of the Competence for Investigation from the Competition Authority to the Authority for Economic and Food Safety ("ASAE")

The new Act takes the competence for the investigation of infringements to the new regime away from the Competition Authority, handing it over to the Authority for Economic and Food Safety ("ASAE").

In fact, the legal regime of individual restrictive trade practices is not part of competition law *stricto sensu*, in so far as it aims to ensure the protection of economic operators from conducts adopted by other operators which do not

[2] They are: *a)* imposing the impossibility to sell to any other company at a lower price; *b)* adopting prices, terms of payment, terms of sale and commercial cooperation conditions which are exorbitant in relation to its general conditions of sale; *c)* imposing unilateratly, directly or indirectly, promotions regarding a particular product or payments in return for promotions; *d)* obtaining consideration for ongoing or completed promotions, including discounts that consist on the assignment of a right to compensation in a subsequent acquisition of equivalent goods or of any other goods; and *(e)* amending retroactively a supply agreement.

[3] They are: *a)* rejecting or returning the delivered goods, based on the lower quality of the whole or part of the order or the delay of delivery, without having been demonstrated, by the buyer, that the supplier was liable for such occurrences; and *b)* imposing a payment, either directly or in the form of a discount: *i)* for the non-fulfillment of the buyer's expectations regarding the volume or value of sales; *ii)* for the introduction or reintroduction of products; *iii)* as compensation for costs incurred as a result of a consumer's complaint, unless the purchaser demonstrates that this complaint is due to negligence, breach of contract or failure to comply with the agreement by the supplier; *iv)* to cover any waste of products of the supplier, unless the purchaser demonstrates that such waste is due to negligence, breach of contract or failure to comply by the supplier; *v)* for costs related to transportation and storage incurred after the delivery of the product; *vi)* as a contribution for the opening of new establishments or remodeling of existing ones; *vii)* as a condition to start a business relationship with a supplier.

distort competition but which are in breach of the principles of fairness, balance and transparency governing commercial relationships.

Thus, the Portuguese Authority for Economic and Food Safety is now responsible for monitoring the compliance with the provisions of the new Act, and for investigating offences to the new regime.

It should be noted that procedures which are pending in the investigation phase before the Competition Authority on the 30th day before the date of the entry into force of the new regime will be automatically transferred to the Authority for Economic and Food Safety. In these cases, the procedural or substantive time limits shall be suspended that day, and will restart counting on the 30th day after said date.

6. Institutionalization of Self-Regulation

Lastly, the new regime specifically provides for the possibility of representative bodies of all or of some of the economic sectors to adopt self-regulatory instruments designed to regulate their respective commercial transactions.

With this novelty, the legislator intends to privilege consensual solutions reflecting the commitment of economic agents represented by their associative structures in a complementary, self-regulatory and voluntary process. As such, this process implies a set of advantages, notably the fact that it settles the commitment of the parties to comply with certain principles and adopt certain actions, and it entails the flexibility and ability to adjust to the dynamics of economic activities[(4)].

Additionally, the legislator understands that a document including the basic negotiating conditions reinforces transparency and ensures non-discrimination and reciprocity between economic partners. Special attention is given to commercial relations between distributors and suppliers outside the agro-food sector, and within this sector between medium and large size suppliers.

Finally, the Act stresses that self-regulation will achieve more effective and efficient results if the compromises therein reached include monitoring solutions and mechanisms of conflict resolution that give credibility to it.

Self-regulatory instruments adopted under the new regime are subject to governmental approval by the member of Government responsible for the area of the economy and the corresponding sector of activity. The members of the Government responsible for the areas of the economy and agriculture may further create a monitoring mechanism of said self-regulation by an executive decree which establishes the competences and the mode of functioning of such mechanism.

Lisbon, 8th January 2014

[(4)] See the preamble of the Act, § 2.