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Competition - Portugal

Government authorised to increase fines for individual commercial practices

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Introduction

Since 1993, Portugal has enforced a legal regime that deals with individual commercial practices by economic agents regarding, among other things, below-cost selling, objectively non-justified discriminatory commercial conduct and list prices.

Under this regime – enshrined in Decree-Law 370/93, as amended by Decree-Law 140/98 – natural and legal persons can be penalised with misdemeanour fines where they:

- implement non-objectively justifiable discriminatory commercial conduct;
- do not disclose list prices; or
- execute sales below cost.

In relation to this latter action, the 1993 regime states that it is forbidden to sell any product to a company or final consumer at a price below its effective purchase price (the net invoice price), plus taxes payable on that sale and, where applicable, transportation costs.

The 1993 act can be applied in situations that are not caught by the National Competition Act (Law 19/2012), notably in cases in which no dominant position is held by a company that, for instance, executes sales below cost.

With Law 31/2013, Parliament has now authorised the government to review the 1993 regime, conferring to the executive branch the legislative power to enhance the applicable punitive misdemeanour framework.

Main findings

Under Parliament's legislative authorisation, the misdemeanour fines applicable to individual commercial conduct may increase substantially in the near future, as set out in the table below.

Relevant bodies		1993 act penalty range	2013 act penalty range
Natural persons		€250-€3,740	€250-€20,000
Legal persons	Micro-enterprise	€250-€15,000	€500-€50,000
	Small enterprise		€750-€150,000
	Medium enterprise		€1,000-€450,000
	Large enterprise		€2,500-€2.5 million

Under the new regime, the competent public authority – the Food and Economic Safety Authority (FSEA) – will have the power to impose interim measures on non-compliant economic agents. Furthermore, the FSEA may also apply daily monetary penalties to companies that do not comply with the imposed

administrative interim measures. In this context, the daily penalties can range from €2,000 to €50,000 a day, up to a maximum period of 30 days (ie, for a total penalty of up to €1.5 million).

Comment

This legislative authorisation may strongly inhibit economic agents – especially mainstream food and convenience retailers – from providing better commercial conditions in terms of final price to end consumers, including through discounts. Notably, due to the maintenance of the ban on sales below cost by non-dominant companies to final consumers combined with the enhanced punitive framework, in a worst-case scenario, the fine for each infringement could reach up to €2.5 million.

At a time when Portugal is under a financial assistance programme orchestrated by the International Monetary Fund, the European Central Bank and the European Commission – and in which every penny counts for the final consumer – the need for this proposed enhancement of the punitive framework, aimed at impeding non-dominant retailers from potentially providing better commercial conditions for final consumers, notably through sales below cost, is questionable.

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