Competition - Portugal

New regime introduced for individual commercial practices

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Introduction

The legislation on so-called 'individual commercial practices' was recently revised, with the new regime – Decree-Law 166/2013, due to enter into force on February 25 2014 – comprising important amendments to the substantive provisions on the range and scope of prohibited conduct, the level of applicable fines and the responsible enforcement agency (for further details on these two latter aspects please see "Government authorised to increase fines for individual commercial practices"). The substantive amendments are worth considering, given their potential impact on the way in which affected undertakings do business.

The rationale for the prohibition on individual commercial practices is not the same as that which underpins competition law. The former aims to protect values such as fairness, transparency and balance in the relationship between economic players. Despite this difference, the new provisions share significant points with competition law and reinforce their mutual impact.

Formally, the substantive elements of the law remain the same, providing for:

- a prohibition on discriminatory pricing and sales conditions;
- rules on transparency in pricing and sales conditions;
- a prohibition on below-cost selling;
- a prohibition on refusal to sell goods or render services; and
- a prohibition on abusive business practices.

However, significant modifications have been introduced regarding the scope of these provisions, particularly in relation to below-cost selling and abusive business practices.

Below-cost selling

The legislature's intention behind the amendments was to clarify the provisions on below-cost selling and to facilitate better understanding and supervision of the law. In this respect, the modifications limit the opportunities for resellers (either business to business or business to consumer) to engage in below-cost selling by revising the main concepts of 'effective purchase price' and '(re)sale price'. In addition, deferred discounts (eg, card-deferred and voucher-deferred discounts) – previously irrelevant to the calculation of a product's (re)sale price – will from now on be factored in under certain circumstances. Namely, deferred discounts "granted in each product shall be attributed to the quantities sold for that same product and supplier in the last 30 days". As this wording illustrates, the legislature's good intentions to facilitate clarity and easier implementation have not lived up to reality, as the law is open to interpretation and uncertainty in its practical implementation, particularly with regard to the exact scope of the discounts covered and the calculations to be undertaken to that effect.

Another novelty concerns the rules establishing very short deadlines for the reclamation of invoices (25 days after receipt) and correction of invoices (20 days after reclamation). These deadlines apply across the new law, although they are of particular relevance to below-cost selling. Under the new provisions, corrected invoices issued after the stipulated deadline are not relevant to the assessment of below-cost selling.

Abusive business practices

The most significant modifications have been made to the provisions prohibiting abusive business practices. The list of abusive business practices has been extended significantly, and a special (and more stringent) regime has been created to govern buyers' transactions with certain agro-food suppliers (namely, micro and small companies, producers' organisations and cooperatives). Absolute prohibitions have been imposed on some of these practices, which means that they will be deemed abusive regardless of whether they benefit both parties or were expressly or tacitly agreed between the parties. The new provisions include absolute prohibitions on:

- retroactive amendment of supply agreements;
- receiving compensation for ongoing or finalised promotions; and
- in the agro-food sector, the purchaser's return of goods or refusal to accept goods on the grounds of low quality or delay in delivery without providing evidence of the supplier's liability.

The following practices are now prohibited to the extent that they constitute an 'imposition' by one party on the other:

- mandating that an undertaking not (re)sell to another undertaking at a lower price;
- unilaterally providing a promotion or payment in compensation for a promotion; and
- specifically for the agro-food sector, direct or indirect payments (discounts included) imposed on the buyer for:
  - non-achievement of sales expectations;
  - introduction or re-introduction of products; or
  - compensation of costs following customer complaints or to cover any waste of the supplier's products, except where the purchaser can prove that such waste was due to the supplier's negligence, fault or contractual breach (among other practices).

Amendments to the remaining substantive misdemeanours include:

- additional wording in the provision prohibiting discriminatory prices and sales conditions to the effect that conduct in compliance with competition law will not be regarded as discriminatory;
- under the provision on disclosure of price lists and sales conditions, an exception for information covered by business secrets; and
- an extension of the exemptions from the prohibition on refusing to sell goods or provide services, including for competition law-compliant exclusive distribution agreements in a given territory.

One of the most intriguing aspects of the new regime is its scope of application. The new law shifts away from the principle of territoriality (subsidiarily applicable), expressly limiting its application to "undertakings established in the national territory". However, the terms 'undertaking' and 'establishment' are not defined and their precise scope is open to interpretation. The new regime will not apply to:

- services of general economic interest;
- the purchase or sale of goods and the provision of services subject to sector-specific regulation; and
- the purchase or sale of goods and the provision of services of non-European Economic Area origin or destination.

Comment

While the revision of this regime was discussed in restricted forums for some time, its review would have benefited from a more thorough consideration of the rationale and impact of the amendments adopted. An open public debate also would have been helpful, given the cross-sector effects of the regime and its tone of marked intrusion into private economic relationships. Moreover, some of the provisions adopted in the new law are unnecessarily complex while others are excessively ambiguous and often difficult to understand and reconcile with fundamental principles of civil law. The law's interpretation and implementation will be a demanding task for the companies affected by its provisions (now facing the risk of much higher fines, in some cases of up to €2.5 million) and their lawyers, as well as for its new enforcers and the courts. Oddly enough, while prosecution and penalising powers shift away from the Competition Authority to the Authority for Economic and Food Safety, the redrafting now assumes, for some misdemeanours, the need to consider whether the underlying conduct is compliant with competition law. This will call for close cooperation between the two entities and the president of the Competition Authority has already announced that mechanisms are being put in place to that effect.

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