

LEGAL ALERT

INDIVIDUAL RESTRICTIVE TRADE PRACTICES: WHAT'S NEW FOR 2020

Introduction

The Portuguese legal regime on “Individual Restrictive Trade Practices” (“IRTP”) was subject to a new amendment at the end of August, the second one since its enactment in December 2013. The modifications introduced will enter into force on 1 January 2020.

Novelties of the law – selected highlights

The scope of application of the law is revised: whereas previously the law applied only to undertakings established in Portugal, it now defines its scope of application by reference to “... practices that occur on national territory or which may have effects on national territory”. This modification affects mainly undertakings not established in Portugal, but which have commercial relationships with undertakings in the Portuguese territory.

One of the goals behind the amendment was to harmonise IRTP law with the provisions of competition law. This led to the deletion of the provisions of IRTP law that ruled on: *(i)* discriminatory pricing or discriminatory sales conditions between undertakings; and *(ii)* refusals to supply between undertakings. The two types of conduct will from now on be dealt with strictly under competition law rules. While this is a positive modification, its impact is more formal than real, given that these provisions of IRTP law had scarce (if any) effective enforcement.

Another goal of the amendment was to reinforce the existing provisions on imbalanced negotiating positions between market players. To that effect, the subjective and objective scope of what constitutes “abusive negotiation practices” (which are forbidden by law and the respective offenders

subject to fine) is significantly widened. As an example, payment impositions previously sanctioned only when directed at micro or small enterprises, cooperatives or producers' organisations in the agri-food sector are now sanctioned for similarly-structured suppliers regardless of the sector of the economy in which they operate.

But the modifications of the law go beyond the mere protection of imbalanced negotiating positions. They also rule on commercial relationships regardless of the relative strength of the parties involved and/or of the consensual nature of the practices at stake. As an example, the law forbids one contracting party from obtaining from the other a consideration that is neither effective nor proportionate, for example, a consideration obtained through credit or debit notes issued more than three months after the invoice which they refer to.

The prohibition on (re)sale at a loss is also revised. Even though a substantive modification of this practice was not amongst the main objectives of the amendment, a couple of modifications are worth highlighting considering that this prohibition is the cornerstone of IRTP-law enforcement.

Regarding the calculation of the effective purchase price, wholesale discounts that can be deducted from the invoice price no longer have to fall within previously defined categories (of quantity, financial or promotional discounts); at the same time, however, a requirement is introduced that those discounts be identifiable regarding the product, the quantity and period to which they apply. In addition, no discount or payment can be deducted from the invoice purchase price if it is supported on credit or debit notes issued more than three months after the invoice which they refer to.

Regarding the calculation of the sales price, discounts granted on a sale shall only be deducted from the sales price if they are product-specific (as opposed to general discounts given for a group of products – *e.g.*: a discount for a whole category of products, for a whole brand, etc.). A similar reasoning now applies for so-called deferred discounts (*i.e.*, discounts made effective only in a future purchase) as the law clarifies that deferred discounts shall only be relevant for the calculation of the sales price of a product when such discounts refer to the future acquisition of the same product.

Finally, a couple of amendments are introduced with the purpose of reinforcing the operation, inspection and investigation competences of the Authority for Food and Economic Safety (charged with the investigation and sanctioning of the administrative offences established under IRTP law).

Those amendments refer to aspects such as the carrying out of inspections, the deadlines for conclusion of investigations, interim measures and the protection of confidentiality of complainants.

Comment

The IRTP regime has potentially far-reaching consequences for companies because it impacts relevant aspects of commercial dealings by introducing prohibitions that ultimately limit their freedom to negotiate, to contract and to invoice.

The purpose of protecting structurally imbalanced negotiating positions has so far remained largely unachieved due to an enforcement that has focused almost exclusively around investigation and sanctioning of (re)sale at a loss. The latter is, in turn, a prohibition hard to reconcile with competition law's favourable "approach" to aggressive low pricing (absent a dominant market position) and that ends up paving the way for resale price maintenance practices, which are sanctioned by competition law.

The revision that led to this second amendment missed the opportunity for a careful rethinking of IRTP law in order to ensure a common underlying rationale to its prohibitions. Indeed, most of the amendments introduced perpetuate the problems that have surrounded this regime from its inception: widespread interventionism in the content of private relationships, promotion of uncertainty in dealings between market players and a potential increase of companies' costs in adjusting procedures to ensure compliance.

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