

Competition & Antitrust - Portugal

Individual trade restrictive practices regime – light at the end of the tunnel?

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Introduction

The new legal regime on individual trade restrictive practices (enshrined in Decree Law 166/2013) aims to clarify some key aspects of the legislation – in particular, what concerns sales below cost and abusive commercial practices.

However, despite the good intentions of the legislature, Decree Law 166/2013 was subject to major criticism, as several aspects of the old regime and the introduction of new concepts raised many interpretation problems. This ultimately prompted the entity exclusively charged with enforcing this regime – the Authority for Food and Economic Safety (ASAE) – to publish a set of frequently asked questions (FAQs)⁽¹⁾ to offer guidance on the interpretation and enforcement of the legal provisions.

One of the key problems of the new legal regime concerns the concepts of 'sales below cost' and the determination of the 'actual purchase price' (for the purposes of assessing a subsequent (re)sale below cost). This update describes the main features of the ASAE's guidelines aimed at clarifying such concepts.

Sales below cost according to ASAE

A sale below cost occurs whenever a product is sold or offered for sale to a company or consumer for a price less than its actual purchase price plus taxes and, if applicable, transportation costs. Thus, one of the key concepts of a sale below cost is that of 'actual purchase price', which is defined by law as the unitary price foreseen in the invoice, net of payments or discounts related directly and exclusively to the transaction of the product in question. In addition, the referred payments or discounts must be identified in the invoice or a reference must be made in the invoice to the supply agreements or price lists in force at the time of the transaction where such discounts are identified. Lastly, they must also be determinable at the time of issuance of the respective invoice.

This definition raised numerous interpretation problems, as it left several aspects related to the determination of 'actual purchase price' and discounts relevant for such purposes unclear. In particular, it was unclear whether some volume discounts, such as *rappel*,⁽²⁾ should be taken into account when determining the actual purchase price. An additional problem was that there were no clear guidelines (or consistent case law) on whether the relevant discounts should be directly related to each specific transaction entered into between the supplier and reseller or to the supply relationship as a whole.

This judicial controversy was apparently settled by the Supreme Court⁽³⁾ in May 2014 when the court decided that the amounts paid or credited by a supplier as a *rappel* discount may be deducted by the reseller from the 'actual purchase' price of a given product (for the purposes of assessing a subsequent (re)sale below cost). One of the fundamental grounds for the decision was the idea that granting a discount may result from the supply relationship considered in its entirety, without any need to establish a causal link between the discount and an individual sale. Therefore, the court considered that if the discounts are provided for in the supply contracts with a sufficient level of detail to make them determinable, they are deemed directly related to the transaction and are ultimately relevant for the purposes of determining the actual purchase price of a product. In this context, a door was opened to consider a *rappel* discount as a volume discount and, consequently, as relevant for determining the actual purchase price, even if the discount is granted by thresholds of purchases and the lower thresholds begin with unit one.

These uncertainties appeared to have been solved by the Supreme Court judgment. However, in practice, the problem has persisted to some extent, as the referred decision was rendered in the context of the old legal regime, where the wording of the law was slightly different. It thus remains unclear whether such jurisprudence would also apply in light of Decree Law 166/2013.

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However, the ASAE's intervention proved helpful in clarifying the matter in terms of prospective enforcement. A couple of months after the court's judgment, the authority issued a new set of FAQs⁽⁴⁾ composed of 43 points, which supported the Supreme Court's position. Hence, whereas the first set of FAQs did not convincingly address many of the issues posed by this legal regime, the new set of FAQs partly remedied the matter and were welcomed by the market as clearer and far more informative.

In the new FAQs the ASAE, among other things, clarified that even though discounts must be determinable at the time of the invoice's issuance, they need not be fully determined at that date. Therefore, it is possible to deduct from the purchase price those discounts established from the moment the invoice is issued or before, even if their implementation takes place at a later stage.

Concerning the notion of discounts "related directly and exclusively with the transaction of the products in question", as per the wording of the new law, the authority closely followed the Supreme Court's reasoning, pointing out that this expression means that the attribution of the discounts must have as a cause the supply relationship considered in its entirety and, therefore, that it is unnecessary to establish a causal link between the discount and an individual sale.

In addition, the FAQs expressly support the Supreme Court's view that *rappel* discounts should be regarded as volume discounts and can therefore be deducted for the purpose of determining the purchase price, even if they are granted from the moment that one unit of the product is purchased.

Finally, as a consequence of the Supreme Court judgment, the ASAE acknowledged and accepted that services provided by a reseller to a supplier in the context of a supply relationship can be economically valued and subject to a consideration charged by the reseller or deducted from the price of the goods acquired by the reseller. In this context, the authority emphasised that the transaction at issue is the supply contract; thus, the payments agreed under such a contract are admissible for the purposes of determining the actual purchase price, even if they do not necessarily relate to an individual sale.

Comment

Considering the clarifications provided by the authority's FAQs (August 6 2014), the existing scenario affords suppliers, resellers, consumers and legal professionals far more certainty than before. The FAQs, although binding only for this authority (as a soft law instrument), have helped to resolve a situation that appeared condemned to be left only to the law's obscure wording and the courts' judgment. Thus, there may be some light at the end of the tunnel.

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Endnotes

(1) This first set of FAQs was published by the authority on March 14 2014 and further developed on June 4 2014.

(2) A *rappel* discount is a discount granted to a client for reaching a certain consumption threshold during a fixed time. *Rappel* is usually granted through a scaled form of consumptions or purchases corresponding to a certain scale of discounts. The aim of this technique is to reward the client's effort when acquiring a larger quantity of a certain product or range of products by granting it a higher discount rate.

(3) May 14 2014, No 86/12.5YQSTR.E1-A.S1.

(4) August 6 2014.

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