

PORTUGAL ADOPTS A NEW AND MORE DEMANDING LEGAL REGIME ON UNFAIR UNILATERAL TRADE PRACTICES

INTRODUCTION

Decree-Law No. 166/2013 of 27 December ("DL 166/2013") concerning the new legal regime applicable to unilateral restrictive trade practices was recently published in the Official Gazette, repealing Decree-Law No. 370/93 of 29 October. DL 166/2013 shall enter into force on 25 February 2014.

Transparency in trade relations and the balance of the negotiation positions between companies are key elements to achieve constitutional goals such as the contractual freedom and competitiveness. It is up to the State to establish enforcement mechanisms that will ensure compliance and preventing the distortion of these principles.

The preamble to DL 166/2013 explains that due to "*the difficulties and limitations identified throughout the implementation of Decree-Law No. 370/93 of 29 October, as well as the inadequacy of some of its rules, was acknowledged and transmitted by the economic operators, led to the revision of the legal framework regarding unilateral restrictive trade practices, in order to clarify its application and sufficiently deter its non-compliance*".

SCOPE

This legal framework provides for, *inter alia*:

- The prohibition on sales at a loss;
- The prohibition on the application of discriminatory prices or sales conditions;
- The promoting of transparency in pricing policies and sales conditions (e.g., existence of price tables);
- The prohibition regarding refusals to sell goods or provision of services, and
- The prohibition of abusive trade practices.

MAIN CHANGES

The new legal regime applicable to unilateral restrictive trade practices is now endowed with greater efficiency and effectiveness by virtue of the amendments now introduced.

Monitoring, proceedings and case decision

Monitoring compliance with the legal regime and the prosecution of cases regarding infringements has been transferred to the exclusive jurisdiction of the *Autoridade de Segurança Alimentar e Económica* ("ASAE" - the *Authority for Economic and Food Safety*). As such, whereas previously the prosecution of these cases was within the jurisdiction of the Portuguese Competition Authority, it is the ASAE inspector general who now decides a fine.

Much higher fines

The minimum and maximum fines had substantially increased as follows:

Offender	1993 Decree-Law (Minimum and maximum fines)	2013 Decree-Law (Minimum and maximum fines)
Individuals	€250 - €3,740	€250 - €20,000
Company / Enterprise	Microenterprise	€500 - €50,000
	Small Enterprise	€750 - €150,000
	Medium Enterprise	€1,000 - €450,000
	Large Enterprise	€2,500 - €2,500,000

For this purpose, DL 166/2013 follows the criteria of the Recommendation 2003/361/EC of 6 May 2003 of the European Commission on the classification of a company as micro, small, medium or large enterprise:

Company Size	Number of Employees	Turnover
Microenterprise	< 10 employees	< €2 million
Small Enterprise	< 50 employees	≤ €10 million
Medium Enterprise	< 250 employees	< €50 million
Large Enterprise	≥ 250 employees	≥ €50 million

Interim measures

The ASAE may determine, as a matter of urgency and without prior hearing of the parties concerned, the suspension of the abusive practice in question (*i.e.*, application of interim measures) which is able to cause serious damage that may be difficult or impossible to repair in relation to other companies, in all situations in which the ASAE finds that there is strong evidence of the likelihood that it may occur, even if only in an attempted form. The hearing of the parties concerned will take place within a maximum of 5 days after application of the interim measure, and the decision on its conversion into a definitive measure takes place within a maximum of 10 days after the hearing.

Daily pecuniary penalty

The ASAE can now also apply a periodic pecuniary penalty payment in cases of non-compliance with a decision imposing the adoption of interim measures or the suspension of the abusive practice in question. A periodic penalty payment consists of an obligation to pay a sum for each day of non-compliance from the date laid down to fulfil the obligation. The daily amount may vary between €2,000 and €50,000, though it cannot exceed a maximum cumulative period of 30 days and €1.5 million.

Sales at a loss

Offering for sale or selling a good to a company or consumer for less than its actual purchase price (selling below cost) is prohibited. DL 166/2013 clarifies the concept of sale at a loss, including what is meant by "*actual purchase price*", in order to facilitate its interpretation and monitoring. Another important innovation relates to the fact that the concept of sales at a loss extends its applicability to card rebates, *i.e.*, the deferred rebates consisting of granting a right to use a discount on a future acquisition of goods, will also be relevant in assessing the existence of sales at a loss.

Abusive trade practices

The catalogue of abusive trade practices is extended and some practices have been explicitly identified as abusive, namely retroactive changes to contracts and the unilateral imposition of contractual terms. Contractual clauses containing these abusive trade practices are now null and void when subject to Portuguese law.

The following practices between companies are also prohibited:

- a) The imposition of a ban to sell to any other company at a lower price;
- b) Obtaining exorbitant prices, terms of payment, terms of sale or terms of trade cooperation in relation to the general sales conditions;
- c) Unilaterally impose, directly or indirectly, (i) a promotion campaign for a particular product, or (ii) payment as in return for a promotion campaign;
- d) Obtaining a benefit for an ongoing or past promotion, including discounts that grant a right to compensation when acquiring equivalent goods or good of another nature at a later period; and
- e) Retroactive amendments to supply contracts.

DL 166/2013 also prohibits the following negotiation practices in relation to the buyer and within the food sector, when the supplier is a micro or small enterprise, a producer's organisation or a cooperative:

- a) Rejecting or return of products delivered based on the arguments that part, or all of the products, is of low quality or the existence of a delay in delivering;
- b) Imposing a payment:
 - i. For not fulfilling the expectations of the buyer as to the volume or value of sales;
 - ii. For listing or relisting products;
 - iii. As compensation for costs arising from a consumer complaint;
 - iv. To cover any waste of supplier's products;
 - v. For transportation and subsequent storage costs after delivering the product;
 - vi. As a contribution for the opening of new stores or the remodelling of existing ones;
 - vii. As a condition to initiate a business relationship with a supplier.

Self-regulation

The representative structures of all or some of the economic sectors may adopt self-regulatory instruments aimed at regulating trade transactions among companies. These self-regulatory instruments may contain other provisions from those found within DL 166/2013. Self-regulation will allow for the achievement of more effective and efficient results if solutions for monitoring and conflict resolution are included, providing for more credibility.

Validity of Supply contracts

All supply contracts must be revised and made compatible with the new legal regime within a maximum period of 12 months from the date of entry into force of DL 166/2013. Any clause violating the DL 166/2013 will be considered null and void.

Transition of Files

The cases that are pending in the instruction phase at the Portuguese Competition Authority on the 30th day prior to the date of entry into force of DL 166/2013 and relating to infringements of DL 370/93, will be transferred to the ASAE. Also, the procedural or substantive time-limits will be suspended on the 30th day prior to the date of entry into force of DL 166/2013, recommencing on the 30th day subsequent to that date.

WHY PREVENTING?

This is a legal regime of undeniable practical application due to the following:

- It is applicable to all relations established between companies, irrespective of their size;
- Failure to comply may result in the imposition of a fine of up to a maximum of €2.5 million;
- The ASAE may determine the suspension of abusive practices, as a matter of urgency and without a prior hearing of the parties concerned;
- The ASAE may impose a daily pecuniary penalty in case of non-compliance with a decision imposing the adoption of interim measures;
- Clauses containing abusive negotiation practices are deemed void.

WHAT TO DO?

The publication of the new legal regime relating to individual restrictive trade practices reinforces the importance of the implementation of compliance programs and the revision of contractual clauses (for example, product supply contracts as signed between suppliers / producers and retail companies) and trade practices.

The **SRS Advogados' Competition Department** has extensive experience in:

- The review of contracts to make them compatible with the new regime in time for the entry into force of DL 166/2013;
- The development of compliance and training programs;
- The preparation of internal conduct guidelines (e.g., negotiation of commercial contracts);
- Conducting audits and preventing problems; and
- Complaint procedures before the ASAE against the party that violates the law and subsequent support.

WHAT THEY SAY ABOUT US

"The team's expertise spans compliance, private enforcement, merger control, cartel investigations and abuse of dominance cases." – *Legal 500, 2013*

"Within EU and Competition, SRS Advogados is a first tier firm." – *Legal 500, 2012*

"The seven-lawyer competition department at this prominent Portuguese firm advises on all aspects of the discipline. It is particularly adept in highly regulated sectors and has been extremely busy handling mandates before national and European competition authorities." – *Chambers, 2011*

This note is general and abstract and does not constitute legal advice to any particular case.

SRS Advogados Competition Law and Regulatory Department

www.srslegal.pt

LISBON

R. Dom Francisco Manuel de Melo, n.º 21
1070-085 Lisbon
T. +351 21 313 2000
F. +351 21 313 2001

FUNCHAL

Av. Zarco, n.º 2, 2.º
9000-069 Funchal
T. +351 291 20 2260
F. +351 291 20 2261

OPORTO (*)

R. Tenente Valadim, n.º 215
4100-479 Oporto
T. +351 22 543 2610
F. +351 22 543 2611



1_ GONÇALO ANASTÁCIO

PARTNER
T. +35121 313 2080
goncalo.anastacio@srslegal.pt

2_ LUÍS NETO GALVÃO

PARTNER
T. +35121 313 2035
luis.galvao@srslegal.pt

3_ ANA RITA ANDRADE

MANAGING ASSOCIATE
T. +35121 313 2080
ana.andrade@srslegal.pt

4_ DUARTE PIRRA XAREPE

ASSOCIATE
T. +35121 313 2080
duarte.pirra@srslegal.pt

5_ LESLIE RODRIGUES CARVALHO

TRAINEE
T. +35121 313 2080
leslie.carvalho@srslegal.pt

6_ PROFESSOR MANUEL PORTO

OF-COUNSEL
T. +35121 313 2080

This document is provided for information purposes only and does not constitute legal advice. In case any clarification is need, please contact your lawyer or legal advisor.

The Curriculum of the contacts may be consulted at www.srslegal.pt

Sociedade
Rebello de Sousa
& Advogados
Associados, RL

In Association with_
(*) ALC & Associados
ANGOLA
BRAZIL
MOZAMBIQUE