

CUATRECASAS, GONÇALVES PEREIRA



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I THE LEGAL FRAMEWORK OF DISTANCE CONTRACTS AND OF CONTRACTS CONCLUDED OFF-PREMISES

Scope of Decree-Law No. 24/2014, of 14 February

Decree-Law No. 24/2014 of 14 February, which transposed into Portuguese law Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011, reviewed the legal framework applicable to distance contracts and to contracts concluded off-premises, which took effect on 13 June 2014.

Pursuant to this legislation, a distance contract is a contract concluded between the consumer and the supplier of goods or the provider of services, without the simultaneous physical presence of both, which is part of a sales or service supply system organised for distance trade, by means of the exclusive use of one or more distance communication techniques, up to and including the conclusion itself. On the other hand, the contract concluded off-premises, also in accordance with the same law, is a contract concluded in the simultaneous physical presence of the supplier of goods or providers of services and of the consumer, at a place that is not the commercial establishment of the former, including those cases in which it is the consumer that makes a contractual proposal.

In addition to setting out the legal framework applicable to distance contracts and to contracts concluded off-premises, Decree-Law No. 24/2014 of 14 February also governs other forms of sale, such as automatic sales and special isolated sales. Automatic sales consist of placing a good or service at the disposal of the consumer so that the latter may acquire it through the use of any type of mechanism, with the advance payment of its price. On the other hand, special isolated sales are sales made occasionally outside commercial establishments, in private premises or areas specially agreed or provided for that purpose.

On the contrary, the scope of Decree-Law No. 24/2014 of 14 February, does not include several contracts, among which noteworthy are contracts relating to financial services, contracts of games of chance, social services contracts, contracts for care relating to health services, contracts for services provided within the legal framework of the taking up and pursuit of the activity of travel and tourism agency and passengers transportation service contracts (in the latter case and whenever the contract in question is a distance contracts, the formal requirements set out in this Decree-Law shall apply).

Main Aspects of the Legal Framework of Decree-Law No. 24/2014, of 14 February

Information Obligations

Having defined the scope of Decree-Law No. 24/2014, of 14 February, let us now move on to the main aspects of its legal framework. In this connection, it must be said, to begin with, that this legal framework prohibits certain commercial practices, such as, tying (which is making the sale of a good or the provision of a service subject to the acquisition, by the consumer, of another good or service) and the supply of goods not requested by the consumer.

In addition to the prohibitions referred above, Article 4 of this Decree-Law provides that, prior to the consumer being bound to a distance contract or a contract concluded off-premises or by a corresponding proposal, the supplier of goods or provider of services must provide to the consumer, in a timely manner and in clear and comprehensible form, various pre-contractual information. The set of information is rather broad, and is listed in detail in the various paragraphs of number 1 of Article 4 referred above. From among the pre-contractual information, we highlight, due to its importance, that the new legal framework establishes that the consumer must be informed, should that be the case, of the existence of the right to freely terminate the contract, of its term, of the procedure and of the conditions for the exercise of the right of free termination. Pursuant to this legislation, the information concerning the right of free termination is deemed duly given by the supplier of goods or provider of services, if provided to the consumer in writing.

In the case of distance contracts, the pre-contract information, referred to above, in addition to being provided in a clear and comprehensible manner, must also be provided by means suited to the distance communication technique employed, observing the principles of good faith, of loyalty in commercial transactions and protection of incapacitated persons, in particular underage persons. Among distance contracts, those concluded electronically, concluded through distance communication means with limited space or time to disclose the information and those concluded over the phone are subject, in Article 5 of the Decree-Law which is the subject of our analysis, to specific regulation in terms of pre-contract information obligations. Finally, it should also be mentioned that, in distance contracts, the supplier of goods and the provider of services must confirm the conclusion of the distance contract within five days from such conclusion and no later than the time of delivery of the goods or before the beginning of provision of the service, unless, before the conclusion of the contract, the pre-contract information is provided to the consumer in a durable medium.

On the other hand, contracts concluded off-premises must be put down in writing and must contain in a clear and comprehensible manner and in Portuguese the pre-contract information required by law, failing which they shall be null and void. Moreover, in this type of contracts, the supplier of goods or the provider of services must provide to the

consumer a copy of the signed contract or a confirmation of the contract on paper or, where the consumer agrees, on another durable medium, including, in the case of supply of digital contents not supplied in material form, confirmation of the prior, express consent and its acknowledge.

Right of Free Termination

In the scope of the previous legal framework, consumers already had the right to terminate the contract within a 14-day period, without paying compensation and without having to state the reason for termination. This new law now makes certain changes to the so called right of free termination. Indeed, the consumer continues to have 14 days to terminate the contract, the rules for calculation of the time period to exercise the right of termination, are specifically set out in the various paragraphs of Article 10(1), depending on the concrete type of contract concluded.

The consumer may exercise the right of free termination by sending the “free termination” form, attached to the Decree-Law which is the subject of our study, or by means of any other unequivocal declaration of termination of the contract (in particular, by letter, telephone contact, through the return of the good or other mean capable of being proved under the general terms). It should be also added that any clauses imposing on the consumer a penalty for the exercise of the right of free termination or establishing a waiver of such right are null and void.

Should the consumer exercise the right of free termination, the supplier of goods or provider of services shall be obliged, pursuant to Article 12 of Decree-Law No. 24/2014, of 14 February, to reimburse the consumer all payments received, including delivery costs within 14 days from being informed of the decision to terminate the contract. Where the supplier of goods or provider of services fails to comply with the reimbursement obligation, within the time limits referred to in the legislation, the amounts paid by the consumer shall be returned in double, within 15 working days, without prejudice to the right to compensation for pecuniary and non pecuniary damages.

In accordance with the Decree-Law which is the subject of our analysis, where the supplier of goods or provider of services does not offer to collect the good himself, the consumer shall return or deliver the good, within 14 days from the date of the notification of the decision to terminate the contract. Under this new scheme, the consumer bears the cost of returning the good, unless it is agreed with the supplier that the latter bears such costs or when the consumer has not been previously informed by the supplier of the consumer’s obligation to pay the costs of return. Finally, the consumer has also the duty to conserve the good so as to be able to return it in appropriate conditions. However, it should be noted that the exercise of the right of free termination is without prejudice to the right of the consumer to inspect the nature,

characteristics and operation of the good, provided such inspection does not exceed the handling usually permitted in a commercial establishment.

Should the consumer wish the provision of the service to begin during the term fixed for the exercise right of free termination, the provider of services must ask the consumer to submit a request to that effect in a durable medium. In this case, should the consumer exercise the right of free termination, the provider of services must be paid an amount proportionate to what was actually provided until the notification of termination, by reference to all the payments provided for in the contract. This proportional amount shall be calculated on the basis of the total contract price, however, where the total price is too high, the proportionate amount shall be calculated on the basis of the market value of what was tendered. In any case, in accordance with the provisions of Article 15(5) of the above mentioned Decree-Law, there are costs that are not to be borne by the consumer, under any circumstance.

Finally, it should be said that in the various paragraphs of Article 17(1) of Decree-Law No. 24/2014, of 14 February, there are cases in which the consumer cannot freely terminate the contracts concluded. Among those cases, we highlight, in particular in the scope of service agreements, two separate situations. The first is the situation in which the services have been fully provided, with the prior express consent of the consumer. The second situation occurs when the consumer acknowledges that he or she forfeits the right of free termination if the contract is fully performed by the professional in such case.

Imperative nature

The clauses that, directly or indirectly exclude or limit the rights of consumers, provided for in Decree-Law No. 24/2014 of 14 February, are absolutely forbidden, and the clauses setting out a waiver of those rights, as well as those establishing any kind of compensation or penalty if the consumer exercises those rights, shall be deemed not written.

Finally, it should be mentioned that the breach of the provisions set out in this Decree-Law amounts to a misdemeanour, punishable by fines ranging, for natural persons, from € 250.00 to € 3,700.00 and, for legal persons, from € 1,500.00 to € 35,000.00. The monitoring of commercial practices and the gathering of evidence in the scope of the corresponding misdemeanour proceedings is the task of ASAE.

II NATIONAL LEGISLATION

Portaria (Ordinance) No. 153/2014. D.R. (Portuguese official gazette) No. 148, Series I of 2014-08-04

Ministry of Health

Approving the *Regulamento do Fundo para a Investigação em Saúde* (Health Investigation Fund Regulation).

Directive No. 14/2014. D.R. (Portuguese official gazette) No. 148, Series II of 2014-08-04

Energy Services Regulator

Approving the Manual of the Infrastructure Access Procedure and the time limits for the announcement, request and granting of capacity and time limits for the prediction of consumption and use of the capacity for 2014-2015

Decree-Law No. 122/2014. D.R. (Portuguese official gazette) No. 153, Series I of 2014-08-11

Ministry of Economy

Laying down the legal framework applicable to road safety audits, with regard to the rules on the pursuit of this activity, to the corresponding supervision and sanctioning rules and to the duties of the certifying entity, as provided for in Decree-Law No. 138/2010 of 28 December, transposing Directive No. 2008/96/EC of the European Parliament and of the Council of 19 November, on road infrastructure safety management.

Decree-Law No. 124/2014. D.R. (Portuguese official gazette) No. 157, Series I of 2014-08-18

Ministry of Finance

Permitting the privatisation of the remaining holding of PARPÚBLICA-Participações Públicas, SGPS, S.A., in the share capital of CTT - Correios de Portugal, S.A., to also take place through one or several institutional direct sale operations with a view to the spreading of shares through national or international qualified investors.

Decree-Law No. 125/2014. D.R. (Portuguese official gazette) No. 157, Series I of 2014-08-18

Ministry of Economy and Employment

Approving the by-laws of *Autoridade da Concorrência* (Competition Authority), adapting it to the framework set out in the framework law of regulators, approved by Law No. 67/2013, of 28 August.

Regulation (EU) No. 909/2014 of the European Parliament and of the Council of 23 July 2014, on improving security settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No. 236/2012.

Regulation (EU) No. 910/2014 of the European Parliament and of the Council of 23 July 2014, on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC.

III NATIONAL CASE LAW

Judgment of the Supreme Court of Justice No. 9/2014 D.R. (Portuguese official gazette) No. 114, Series I of 2014.06.17
Extraordinary appeal for the settlement of case law – Rappel Discounts

With this judgment, the Supreme Court of Justice (SCJ) was requested to rule on the extraordinary appeal for the settlement of case-law, brought by the Public Prosecutor (PP), on grounds of the opposition between judgments of the Court of Appeal – judgment of the Court of Appeal of Évora, of 07/05/2013, delivered in case No. 86/12.5YQSTR.E1, and the judgment also of the Court of Appeal of Évora, of 16/04/2013, delivered in case No. 55/12.5YQSTR.E1.

To sum up, the Court of Appeal of Évora, in the judgment delivered in case No. 86/12.5YQSTR.E1, requested to rule on the appeal brought by the appellant Modelo Continente Hipermercados, S.A., with regard to the decision delivered by *Tribunal da Concorrência, Regulação e Supervisão*, that a rappel discount the first grade of which begins with “1” unit is not an economic discount, directly associated with the transaction and objectively justified according to such transaction, but is rather a discount of a subjective nature, for which reason fixed and unconditional discounts always applicable to a given economic agent, on the grounds of its purchase record, are not acceptable for the purpose of the calculation of the actual costs price, confirmed the ruling appealed against, concluding that such discounts do not fall within the list provided set out in Article 3 of Decree-Law No. 370/93, of 29 October, as amended by Decree-Law No. 140/98, of 16 May. On the contrary, the Court of Appeal itself, in the judgment delivered in case No. 55/12.5YQSTR.E1, in an appeal brought by the appellant Modelo Continente Hipermercados, S.A., against the decision delivered by *Tribunal da Concorrência, Regulação e Supervisão*, considered that the discounts directly related with the transaction in question are quantity discounts (in which the so called rappel discount is included), financial discounts and promotional discounts provided the same are identifiable by product, quantity and period of validity and that they must be deducted from the purchase invoice price to form the actual purchase price.

Therefore, considering the differing positions, the plenary of the criminal chambers of the SCJ resolved to settle the case law, to the effect that a graded rappel discount, the first grade of which begins with one (euro, kilograms, litres etc.), is a quantity discount that, pursuant to Article 3(2) and (3) of Decree-Law No. 370/93, of 29 October, as amended by Decree-Law No. 140/98, of 16 May, is to be taken into account in the determination of the effective purchase price, where the other requirements that the same be stated in the invoice or, by reference thereto, in supply contracts or price lists and be capable of being determined upon issue of such invoice, are met.

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