

CUATRECASAS, GONÇALVES PEREIRA



NEWSLETTER | CORPORATE

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NEWSLETTER CORPORATE

I ANALYSIS OF DECREE-LAW NO 10/2015, OF 16 JANUARY, APPROVING THE LEGAL FRAMEWORK OF THE ACCESS TO AND PURSUIT OF TRADE, SERVICES AND CATERING ACTIVITIES

Decree-Law No 10/2015, of 16 January, approving the legal framework of the access to and pursuit of trade, services and catering activities (*RJACSR*) and amending, among others, the legal frameworks below, came into force on 1 March 2015:

- a) Decree-Law No 48/96, of 15 May, as amended by Decrees-Law No 126/96 of 10 August, 111/2010 of 15 October and 48/2011 of 1 April (opening hours of commercial establishments);
- b) Decree-Law No 8/2007 of 17 January, as amended by Decrees-Law No.s 116/2008 of 4 July, 292/2009 of 13 October and 209/2012 of 19 September (Simplified Business Information);
- c) Decree-Law No 70/2007 of 16 March (commercial practices at reduced price in retail sales made in commercial establishments);
- d) Decree-Law 48/2011 of 1 April, as amended by Decree-Law 141/2012 of 11 July (legal framework of access to and pursuit of several economic activities in the scope of the "Licenciamento Zero" measure);

Our analysis will be limited to the main changes to the legal framework of opening hours of commercial establishments, the legal framework of commercial practices with price reduction in retail sales and the rules for access to and pursuit of trade, service and catering activities.

Legal framework of the opening hours of shops

Alongside the liberalization of the opening hours of shops, there is a decentralisation of the decision to limit opening hours. Municipalities can restrict opening hours, in accordance with criteria that relate to the safety and protection of the quality of life of citizens, without prejudice to the labour law and noise laws.

- **New opening hours**

Retail, service, catering or drink establishments, catering or drink establishments with space for dancing or dance rooms, or where people habitually dance, or where artistic

shows are held, on an ancillary basis, as well as fixed places for non-artistic shows and public amusement areas will now have free opening hours.

- **Municipal competences**

However, municipalities, after hearing several entities, may limit the periods of operation, effective at all times of the year or only at certain times, in duly justified cases, which relate to the safety or protection of the quality of life of citizens, and municipal agencies should adapt municipal regulations on working hours resulting from this legislative amendment.

Shops must post the opening hours map in a place clearly visible from outside.

- a) **Misdemeanour rules**

With regard to misdemeanour arising from non-compliance with the new rules imposed by the legislative amendment, the fines range from €150 to €450, for natural persons, and from €450 to €1,500, for legal persons, in case of failure to post the opening hours and from €250 to €3740, for natural persons, and from €2,500 to €25,000, for legal persons, in case of functioning outside the hours established.

Legal framework of commercial practices with price reduction

With regard to retail sales with price reduction, while the period of four months a year for sales, the limitation to make sales in period defined by law is eliminated and the economic operators are given the freedom to define when they want to make them, according to their business management strategies.

- b) **Scope**

With regard to the scope of application resulting from the amendment, remote sales made remotely, at home or by other methods outside the establishments, are now covered by this legal framework.

- c) **Concept of sales**

The concept of "sale", as commercial practice at reduced price, has now also another definition. "Sales" are now understood to be the "sale of products effected at a price lower than the one previously made in the same commercial establishment (...)"; the reference to a specific period of the year has now been eliminated ("practiced at the end of the season").

d) Obligations and prohibitions

In the scope of the commercial practices at reduced price (sales, promotions and closing down sales), the new legal framework has imposed the requirement to unequivocally state the form of sale, type of products, the corresponding reduction percentage, as well as the start date and duration.

However, reduced price sales of products purchased after the start date of the reduced price sales is now prohibited, even if their price may be the same of the one practiced during such period. Also, in the case of the promotional sale of products, the previous price and the promotional price must be specified as well as the charges arising therefrom, if any.

e) Notice of sale

Sales can now be made any time of the year, but cannot exceed, as a whole, the duration of four months a year. Additionally, this selling arrangements is now subject to a declaration issued by the trader to *Autoridade de Segurança Alimentar e Económica* (ASAE) (Food and Economic Safety Authority), with at least a 5-working-day notice, through *Balcão do Empreendedor* (Entrepreneur's Desk), which shall include: (i) identification and address of the trader or address of the establishment, (ii) tax identification number and (iii) start and end date of the relevant sales period.

Like with sales, closing down sales depend on a declaration issued by the trader, addressed to ASAE, also through *Balcão do Empreendedor*, 15 days in advance of the date set for the beginning of the closing down sale, which must include: (i) identification and address of the trader or address of the establishment, (ii) tax identification number, (iii) facts which justify the closing down sales, (iv) identification of the products to sell and (v) start and end date of the closing down sales, which must not exceed 90 days.

After the declaration of the closing down sales, the same must take place in the establishment where the products are usually sold, save in case of duly substantiated practical or legal impediment, which the trader must communicate to ASAE.

f) Misdemeanour

Breach of the rules and procedures described above amounts to a misdemeanour punishable by a fine between €250 and €3,700 or €2,500 and €30,000, depending on the same being committed by a natural or a legal person, respectively.

Legal framework of the access to and pursuit of trade, service and catering activities (RJACSR)

With the new legal framework referred to above, the principle of freedom of access to and pursuit of trade, service and catering activities is now in force, and according to the same the activities are not subject to any administrative permit that specifically targets them, save for the following exceptional situations which are expressly provided for in the law:

- a. Simple prior communications: the following, among others, will now be subject to a simple prior communication: operation of commercial establishments (essentially, CAE's 46 and 47, catering and sale of food products), operation of pet-shops, sex shops or the operation of motor vehicles, motorcycles and mopeds repair and maintenance shops.

Access to these activities must be communicated to *Direcção-Geral das Actividades Económicas (DGAC)* (Directorate-General for Economic Activities), through the Entrepreneur's Desk; the activity may be started as soon as the fees due are paid.

Thus, the accountability of the players has been strengthened by strengthening the monitoring and increasing applicable fines.

- b. Authorisations: for wholesale trade establishments and warehouses of foodstuff of animal origin and catering or drink establishments, where exemption from certain requirements is necessary should be applied for.

In these cases, applicants have to request the authorisation from the competent municipal authorities, through an application for authorisation sent through the Entrepreneur's Desk. Municipalities must examine the request within 30 days, and can issue a request to improve the application should the application not be complete with all the necessary information. Should the municipality not issue the authorisation after the time limit referred to above, the application shall be deemed to have been tacitly approved.

However, some of the activities subject to authorisation require the inspection of *Direcção-Geral de Alimentação e Veterinária (DGVA)* (Directorate General for Food and Veterinary Services). In these cases, the opinion of the *DGAV*, which contains the result of the inspection, is mandatory and binding, there being no tacit approval.

- c. Joint authorisations: applicable to the cases of large stores not included in shopping complexes or shopping complexes with a gross leasable area of 8,000 m² or more.

In such cases, the applicant shall request the authorisation by means of an application sent through the Entrepreneur's Desk, addressed to *DGAE*, which has 30 days to issue a final report and send it to the joint consideration of the President of the Commission for Regional Coordination and Development (CCDR) and the Mayor, who shall give a response within 10 days. The lack of response by these entities is considered as agreement with the final report of *DGAE*. In these cases, *DGAE* notifies the applicant of the decision within 5 days and documentary evidence of the authorization granted can only be issued after payment of the fee due.

- **Misdemeanours**

The amounts of applicable fines ranges from €300 to €180,000, depending on the misdemeanour being minor, serious or very serious or the nature of the offender (micro-company, small, medium or large company).

II NATIONAL LEGISLATION

Decree No 1043/2015 – *Diário da República* (Portuguese official gazette) No 22/2015, Series II of 2015-02-02

Creating the working group for the monitoring of the rental market in Portugal

***Portaria* (Ordinance) No 17-B/2015 – *Diário da República* (Portuguese official gazette) No 21/2015, 2nd Supplement, Series I of 1015-01-30**

Creating a new series of saving certificates, called “*série D*”

Decree-Law No 19/2015 – *Diário da República* (Portuguese official gazette) No 23/2015, Series I of 2015-02-03

Creating, within the functional competence of the National Registry of Companies, the Registry of Canonical Legal Persons

Resolution of the Council of Ministers No 6-A/2015 – *Diário da República* (Portuguese official gazette) No 22/2015, 1st Supplement, Series I of 2015-02-02

Approving the Competitiveness Agenda for Trade, Services and Catering 2014-2020 and establishing the Board for Trade, Services and Catering, setting out its composition and functioning

Decree No 1156/2015 – *Diário da República* (Portuguese official gazette) No 24/2015, Series II of 2015-02-04

Appointing the members of the Special committee to monitor the indirect reprivatisation procedure of TAP – Transportes Aéreos Portugueses, S. A. (TAP, S.A.)

Decree-Law No 23/2015 – *Diário da República* (Portuguese official gazette) No 26/2015, Series I of 1015-02-06

Approving the new scheme of State incentives for media

Ordinance No 23/2015 – *Diário da República* (Portuguese official gazette) No 26/2015, Series I of 1015-02-06

Amending for the first time Ordinance No 44-A/2014, of 20 February, approving the rules of the “Fatura da Sorte” draw.

Decree-Law No 26/2015 – *Diário da República* (Portuguese official gazette) No 26/2015, Series I of 2015-02-06

Promoting a more favourable environment for the restructuring and revitalisation of companies, for the long-term financing of productive activity and the issue of hybrid capitalisation instruments, amending the System of Recovery of Companies through Extrajudicial Means, the Code of Insolvency and Recovery of Companies and the Companies Code

Law No 9/2015 – *Diário da República* (Portuguese official gazette) No 29/2015, Series I of 2015-02-11

Amending for the first time Law No 14/2008, of 12 March, which prohibits and punishes discrimination based on sex in the access to and supply of goods and services, transposing into Portuguese law Council Directive No 2004/113/EC of 13 December.

Order No 1469-A/2015 – *Diário da República* (Portuguese official gazette) No 29/2015, 1st Supplement, Series II of 2015-02-11

Setting the start date of the informative measures and time limit for the submission of a binding bid in the indirect privatization procedure of the share capital of TAP – Transportes Aéreos Portugueses, S. A.

III NATIONAL CASE LAW

Judgment of the Constitutional Court No 770/1014

This judgment does not hold unconstitutional the part of the rule of paragraph b) No 1 in conjunction with No 2 of Article 824 of the Civil Procedural Code, which permits the attachment of up to 1/3 of periodical payments (limits to the possibility to attach pensions or social benefits).

Judgment of the Supreme Court of Justice of 27 January 2015

Subsequent change of circumstances – Amendment of Contract – Financing contract – Economic crisis – Security – Default by debtor

The guarantor of a loan agreement, could not, in particular if he or she is a lawyer, not know that in 2007 the country was already in a financial crisis, for which reason the arrival of the economic crisis could not constitute a change of circumstances that could justify the amendment of the contract.

Judgment of the Supreme Court of Justice of 13 January 2015

Promissory-Contract – Purchase and sale – Termination clause – condition-fact – Burden of proof – Interpretation of facts – Non-compliance – *Mala fide* litigation

In a promissory contract subject to a termination clause of obtaining 80% of the financing for the purchase of real estate property, evidence that a loan of such amount was not granted to residents in Portugal is enough to consider that the termination occurred.

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