COMPETITION

Potentially discriminatory reform threatens trade

Attempts to promote Portuguese producers with reforms on individual restrictive trade practices risks losing them to foreign rivals

After a number of years of fierce public debate, a new reform introduces significant changes to 'individual restrictive trade practices' in Portugal. The ban on such practices – ie selling products at a loss – has been outlawed for more than three decades by the Restrictive Trade Practices Act (PIRC), but the reform introduces controversial new measures, including dramatically increasing the maximum level of fines, previously capped at €2,500

"The main change is the level of fine that can be levelled at a company, which can now go up to €2.5 million," remarks Miguel Mendes Pereira, EU & Competition Partner at Vieira de Almeida & Associados. "Under the old system, big companies did not take the threat of restrictive trade practices that seriously, but such a large fine means they are now taking notice."

The PIRC is predominantly to ensure that Portuguese producers are not unfairly exploited by hypermarkets, and the original legislation, passed in 1983, has been revised a number of times.

Mendes Pereira believes the entire PIRC regulations are a symptom of contradiction because, on the one hand, Portugal already has in place a competition law regime that aims at enhancing consumer welfare by means of low prices, but, on the other, these rules now prohibit companies from selling goods at low prices.

"The rules are also blatantly discriminatory against Portuguese and EU companies," he continues. "For example, the ban on selling a product at a loss only applies to companies established in Portugal – foreign businesses are not bound by the rules. Likewise, it only applies to goods produced or destined to the EU and not to those from outside the EU. It is bizarre and certainly not the best way to support the regional economy."

The contradiction means that a Portuguese hypermarket is duty bound to sell local tomatoes at a certain price. It can, however, import tomatoes from China, the US or India and sell them for any price, including as a 'loss leader' to entice shoppers to buy additional products.

"In a way, these rules may induce discrimination against national producers," explains Miguel Gorjão-Henriques, Head of EU & Competition at Sérvulo & Associados. "Traders are free to purchase goods from outside the EEA and sell them at any price in Portugal, which may undercut local producers considerably as they may only sell their similar products at a higher price. The risk is that the law intended to protect small producers and suppliers ends up doing the opposite."

The decision to raise the maximum fine has already angered the major hypermarkets, say lawyers. The situation is very sensitive and the key aspect will be what happens when it comes to enforcement. The number of cases brought for breach of the law under the €2,500 maximum fine was limited, as €2,500 was a fairly inconsequential amount for giant hypermarkets – a €2.5 million fine, however, is another matter.

The higher stakes mean some lawyers expect that any enforcement could result in rather lively disputes as any hypermarket pursued by the Authorities is likely to hit back quite hard at such unprecedented fines.

"It is not clear yet what the level of enforcement may be," Gorjão-Henriques adds. "The Authority charged with enforcing the Regulations does not have the expertise and sufficient resources to deal with the complex issues arising from the legislation. I also think it will be cautious in the early stages by not issuing harsh fines because that is likely to lead to serious litigation – companies are not interested in such a litigation."

A full challenge to a heavy fine (or even the legality of the rules) could end up in the Government losing the cases too. As such, there is something of a stand-off between the more aggressive stance of the Authorities and the market freedoms wanted by the hypermarkets, say lawyers. And it will probably take a few test cases before the new fines – or the rules themselves – are actually viable.