

APRIL 3RD, 2023

CONSUMER PROTECTION REGIME

On March 3rd, 2023, Law No. 10/2023, which transposed the European Directive (EU) 2019/2161 on the Consumer Protection Regime, was published.

This regime entered into force on March 25th, 2023, and aims to protect consumers by increasing the number of offences that can be committed by traders and by including a European dimension in the administrative offence part of the amended texts.

This Law amended five Decree-Laws:

- a) Undertakes the seventh amendment to **Decree-Law No. 446/85**, October 25th, which establishes the legal framework of general contractual clauses;
- b) Undertakes the fourth amendment to **Decree-Law No. 138/90**, April 26th, which requires goods for retail sale to display the respective sale price to the consumer;
- c) Undertakes the fifth amendment to **Decree-Law No. 70/2007**, March 26th, which regulates commercial practices with price reductions in retail sales practiced in commercial establishments, with a view to the disposal of stocks, increase in sales volume or to promote the launch of a product not previously commercialised by the economic agent;
- d) Undertakes the fourth amendment to **Decree-Law No. 57/2008**, March 26th, which sets out the legal framework applicable to unfair commercial practices by companies in relations with consumers, occurring before, during or after a commercial transaction regarding a good or service;
- e) Undertakes the fifth amendment to **Decree-Law No. 24/2014**, February 14th, on contracts concluded at a distance and away from business premises.

I. CEILING FOR FINES TO BE IMPOSED IN THE CONTEXT OF COORDINATED ADMINISTRATIVE ACTION BETWEEN THE MEMBER STATES

The Decree-Law in question sets a maximum fine of 4% of annual turnover for offences which are the subject of coordinated actions, when these correspond to *widespread*

infringements or infringements at European Union level.

These two concepts are defined respectively in Article 3 numbers (3) and (4) of Regulation (EU) 2017/2394 of the European Parliament and of the Council from December 12th, 2017 in the following terms:

"Widespread infringement":

Any action or omission, contrary to Union legislation that protects consumers' interests, that has harmed, harms or is likely to harm the collective interests of consumers residing in at least two Member States other than the Member State in which:

- (i) the action or omission originated or was committed,
- (ii) the professional responsible for the action or omission is established, or
- (iii) evidence or assets of the professional are found relevant to the action or omission;

Or any act or omission contrary to Union legislation that protects consumers' interests which has harmed, harms or is likely to harm the collective interests of consumers and has common features, including the same illegal practice, the same infringed interest, and is committed simultaneously by the same trader in at least three Member States.

"Widespread infringement at Union level":

A general infringement that has harmed, harms or is likely to harm the collective interests of consumers in at least two thirds of the Member States, which together account for at least two thirds of the population of the Union.

In the absence of information on business turnover, the maximum limit of €2,000,000.00 (two million euros) is applied.

II. CRITERIA TO BE TAKEN INTO ACCOUNT IN ORDER TO DETERMINE THE AMOUNT OF THE FINE

To determine the fine to be applied to specific cases, the various criteria previously established should be considered, namely:

- (i) the nature, gravity, extent and duration of the infringement committed;
- (ii) any measures taken by the infringer to mitigate or repair the harm caused to consumers;
- (iii) any previous infringements by the offender concerned;
- (iv) the financial benefit obtained or loss avoided by the offender because of the infringement committed, if such data is available;

- (v) other aggravating or attenuating factors applicable to the circumstances of the specific case that must be considered, in accordance with the Legal Framework for Economic Offences or the specific administrative offence regimes established in sectorally applicable legislation.

The text adds to this list a new criterion applicable to cross-border situations, according to which the decision-maker must take account of penalties imposed on the same offender in other Member States for the same offence.

III. DECREE-LAW NO. 24/2014, FEBRUARY 14TH ON CONTRACTS CONCLUDED AT A DISTANCE AND AWAY FROM BUSINESS PREMISES

Decree-Law No. 24/2014, February 14th was the one that underwent the most amendments, although most of them are of minor importance. With material relevance, several paragraphs were added to Article 12, with the title *Obligations of the supplier of goods or service provider arising from free termination*.

To understand what is at stake, it is first necessary to define the concept of **digital content** ("data produced and supplied in digital form") and that of **digital service** ("a service enabling the consumer to create, process, store or access data in digital form, or a service enabling the sharing of, or any other interaction with, the data in digital form uploaded or created by the consumer or other users of that service").

The new paragraphs introduced in this article regulate the impact of the consumer's right of withdrawal on distance contracts where the service concerned is digital or relates to digital content.

Thus, an example of digital services that we can draw from the Recitals of the transposed Directive are audio and video file sharing and other file hosting services, word processing or games made available in the cloud, cloud storage services, email services, social networking and cloud applications.

It should be noted that many contracts for the supply of digital content which is not supplied on a material support are characterised by the fact that they are a single act of supply to the consumer of one or more specific items of digital content, such as a specific music file or video file. This particular type of contracts for the supply of digital content, which are not supplied on a material support, remain subject to the exception of the right of withdrawal in Article 16, first paragraph, point (m) of the Directive 2011/83/EU,

as the performance of the contract takes place in the single act (by downloading or streaming content), provided that the consumer has given prior express consent for the performance to commence during the withdrawal period and has acknowledged that he thereby loses his right of withdrawal.

Finally, it may be concluded that the main objective of the Law under analysis is related to the widening and densification of the scope of the right to free termination in the context of digital contracts, whose conclusion is increasingly fast and common nowadays and, for those reasons, deserve as much protection as classic contracts.

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