

Implementation of the Consumer Rights Directive: Portugal

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1. Overview of the New Provisions and Implementation Technique

Portugal transposed the Consumer Rights Directive (CRD) through two separate legislative Acts: one concerning distance and off-premises contracts and the other applicable to all consumer contracts.

Decree Law 24/2014, 24.02.2014 (*Decreto-Lei n.º 24/2014, de 24 de fevereiro*) approved the new Distance and Off-Premises Contracts Act (DOPCA), which entered into force on 12.06.2014, repealing the former DOPCA. The first three provisions specify the subject matter of the Act, its scope and the relevant definitions. Section II (Art 4–21) defines the legal regime applicable to distance and off-premises contracts. Sections III and IV (Art 22–28) contain provisions on other categories of contracts, such as contracts concluded by means of automatic vending machines or automated commercial premises or inertia selling. Art 29 states the imperative nature of the Act. Sections V and VI (Art 30–35) deal with remedies, penalties, measures to inform consumers and traders about the Act and alternative dispute resolution mechanisms available to the consumer, repeals and entry into force.

Subsequently, through Law 47/2014, 28.07.2014 (*Lei n.º 47/2014, de 28 de julho*), a few changes were introduced to the DOPCA, as well as to the Consumer Protection Act (CPA) (*Lei n.º 24/96, de 31 de julho*), with the transposition of Art 5 and 18 to 22 of the CRD. The CPA applies to all

consumer contracts, while the DOPCA is *lex specialis* applying only to distance and off-premises consumer contracts. Information requirements can be found in Art 8 CPA. The new Art 9A, 9B, 9C and 9D deal with additional payments, delivery, passing of risk and communication by telephone. Law 47/2014 only entered into force on 29.07.2014.

2. Use of Options

Although the CRD prevents Member States from maintaining or introducing in their national laws provisions that diverge from those laid out in the CRD, including more or less stringent provisions, to avoid a different level of consumer protection (Art 4 CRD), the CRD leaves to the Member States areas in which they can opt for particular regulatory choices.

In this section we will analyse the options adopted by Portuguese law.

2.1. Low value contracts

Art 3 Para 4 CRD allows the Member States to not apply the CRD to off-premises contracts in which the price payable by the consumer does not exceed EUR 50. Alternatively, Member States may also stipulate a lower value for the exclusion of the applicability of the CRD to off-premises contracts. In the first transposition Act (Decree Law 24/2014), Portugal had not made use of this option. However, Law 47/2014 added a paragraph to Art 2 DOPCA, that excludes from its scope off-premises contracts entered into for the subscription of periodical publications, when such contracts foresee a payment made by the consumer which does not exceed EUR 40. All other contracts, regardless of the amount, are included in the scope of the DOPCA.

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2.2. Day-to-day transactions

In addition, Portugal has not used the option foreseen in Art 5 Para 3 CRD, whereby Member States may not to apply Art 5 Para 1 to contracts which involve day-to-day transactions and which are performed immediately at the time of their conclusion. As Art 8 CPA transposed Art 5 Para 1 CRD without making use of that option, information requirements for on-premises contracts also apply to day-to-day contracts.

2.3. Language requirements

Art 6 Para 7 allows Member States to introduce language requirements regarding the contractual information to ensure that such information is easily understood by the consumer. If we look at the text of the law, Portugal has not made use of this option to all of its extent. In off-premises contracts, the information listed in Art 4 DOPCA must be supplied in Portuguese. Although there is no similar provision for distance contracts in the DOPCA, if the recipients of the information are Portuguese, then the information has to be available in Portuguese.¹ Otherwise the information is not seen to have been provided in a comprehensible manner.² Art 7 Para 3 CPA also imposes traders the use of Portuguese in all relations with consumers.

2.4. Off-premises contracts for repairs or maintenance

Art 7 Para 4 CRD limits the scope of the formal requirements applicable to off-premises contracts when (i) the consumer has explicitly requested the services of the trader for the purpose of carrying out repairs or maintenance, (ii) the trader and the consumer immediately perform their contractual obligations and (iii) the amount payable by the consumer does not exceed EUR 200. Portuguese law does not limit the formal requirements in the mentioned contracts.

2.5. Written confirmation for distance contracts entered into by telephone

As allowed by Art 8 Para 6 CRD, Portuguese law imposes a formal requirement for the acceptance of the consumer in distance contracts where the offer is made by telephone. Art 5 Para 7 DOPCA (amended by Law 47/2014) states that the consumer is only bound by distance contracts concluded by telephone once he (i) has signed the proposal or (ii) has sent his written consent to the trader. This provision does not

apply where the first contact between the parties is carried out by the consumer.

Art 8 Para 6 CRD also allows Member States to determine that the acceptance by the consumer may be issued on a durable medium other than the paper, but Portugal has not made use of this option.

2.6. Payments during the withdrawal period

According to Art 9 Para 3 CRD, Member States may maintain existing national legislation prohibiting the trader from collecting the payment from the consumer during a given period after the conclusion of an off-premises contract. Although the former Portuguese DOPCA prohibited the trader from collecting any payment from the consumer until the delivery of the good or the beginning of the performance of the service, Portugal has not used the option to prolong this regime. Currently, under Portuguese law, if it is agreed upon in the contract the trader can collect the payment from the consumer during the withdrawal period.

3. Possible Implementation Deficiencies

Generally speaking, Portugal seems to have correctly implemented the CRD. However, there are provisions which raise some questions.

3.1. Definition of public auction

Unlike the CRD, the DOPCA does not include, in the definition of public auction, the possibility to attend the auction in person. Despite the amendment of the original provision, the problem has not been solved and an interpretation in conformity with European law is needed.³

3.2. Request for the performance of services to begin during the withdrawal period

Art 7 Para 3 CRD, applicable to off-premises contracts, states that where a consumer requests the performance of services to begin during the withdrawal period, the trader must require the consumer to expressly state such request in a durable medium. In distance contracts regime, Art 8 Para 8 CRD contains a similar provision, although the request is not required to be made in a durable medium. Art 15 Para 1 DOPCA does not differentiate between distance and off-premises contracts, imposing a durable medium for both.

¹ *Morais Carvalho*, Manual de Direito do Consumo² (2014) 143 et seq.

² *Morais Carvalho/Pinto-Ferreira*, Contratos Celebrados à Distância e Fora do Estabelecimento Comercial (2014) 68.

³ *Morais Carvalho/Pinto-Ferreira*, Contratos Celebrados à Distância e Fora do Estabelecimento Comercial (2014) 132.

It has already been suggested that this provision must be interpreted in conformity with European law.⁴

3.3. Delivery

In what appears to have been an error, Art which one is *lex specialis* 18 CRD on delivery has been transposed to Portuguese law in two different provisions, one limited to distance contracts (Art 19 DOPCA) and the other applicable to all consumer contracts involving a good (Art 9B CPA). The latter transposes Art 18 CRD correctly and should therefore be the only provision regulating delivery. Art 19 DOPCA has, therefore, to be interpreted as inapplicable.

4. Specific Issues in Portugal

The implementation method has mainly privileged the literal implementation of CRD provisions.

This technique may raise a few problems of compatibility with the main principles of Portuguese law, problems that can be overcome through the interpretation of the Act.

4.1. Level of consumer protection⁵

In comparison to the previous DOPCA, the new Act expands the list of information requirements and introduces the requirement of express consent from the consumer before being bound by an obligation of payment. If there are restrictions on delivery or the means of payment it should be clearly indicated before the conclusion of the contract.

The consumer is more protected with regard to distance contracts by telephone, since the law requires the written form for acceptance, except where the first contact is made by the consumer.

The right of withdrawal is extended to most service contracts, even if performance has already begun, although the consumer may have to pay a proportional amount for the services actually provided.

With the new Act, the exercise of the right of withdrawal is not subject to formal requirements. In this regard, the Act contains in its annex a model withdrawal form, which despite the possible difficulties of interpretation can be considered as an effective means of making the right known to consumers.

The level of consumer protection, however, also decreases in some aspects.

The omission of information requirements does not determine the extension of the period for exercising the right

of withdrawal (as in the former DOPCA), unless such omission concerns the information on the right of withdrawal itself.

Consumers can no longer make normal use of the good during the period of possible withdrawal from a distance or off-premises contract. The consumers may be held liable for the depreciation of the good resulting from the handling and inspection of the good, if it exceeds the manipulation that would commonly be accepted in a shop.

4.2. District heating

The reference to district heating is a good example of the problems that can result from the implementation of European directives, in particular maximum harmonization directives. As it is mentioned in the CRD 'district heating refers to the supply of heat, *inter alia*, in the form of steam or hot water, from a central source of production through a transmission and distribution system to multiple buildings, for the purpose of heating'. The concept, although understandable, is unknown to the Portuguese society; therefore, it does not make sense to regulate a practice that does not exist and is not likely to exist in the near future.

4.3. Transfer of risk

The implementation of Directive 1999/44/EC of the European Parliament and of the Council of 25.05.1999, on certain aspects of the sale of consumer goods and associated guarantees by Decree Law 67/2003, 08.04.2003 (Sale of Goods Act) has divided the Portuguese doctrine on the effects of the Act in relation to the transfer of risk.

As a general rule, the Portuguese Civil Code states that the risk is transferred, as well as the ownership, when the contract is concluded (Art 408 and 796). In case of generic goods usually the transfer of ownership and risk occurs with the performance, that is with delivery (Art 541). Part of the Portuguese doctrine considered that in consumer contracts, under the Sale of Goods Act, the risk is only transferred with delivery, even in the cases where ownership has already been transferred.⁶

⁴ *Morais Carvalho/Pinto-Ferreira*, *Contratos Celebrados à Distância e Fora do Estabelecimento Comercial* (2014) 121.

⁵ *Morais Carvalho/Pinto-Ferreira*, *Contratos Celebrados à Distância e Fora do Estabelecimento Comercial* (2014) 16 et seq.

⁶ See *Mota Pinto*, *Conformidade e Garantias na Venda de Bens de Consumo*, *Estudos de Direito do Consumidor* (2000) 250; *García-Granero*, *Los Plazos en la Compraventa de Consumo*, *Estudios de Direito do Consumidor* (2004) 154; *Menezes Leitão*, *O Novo Regime da Venda de Bens de Consumo*, *Estudos do Instituto de Direito do Consumo* (2005) 55 et seq; *Larcher*, *Contratos Celebrados Através da Internet*, *Estudos do Instituto de Direito do Consumo* (2005), 196; *Pinto Oliveira*, *Contrato de Compra e Venda – Noções Fundamentais* (2007) 323; *Januário da Costa Gomes*, *Ser ou Não Ser Conforme*, *Eis a Questão*, *Cadernos de Direito Privado* (2008) 15; *Morais Carvalho*, *Manual de Direito do Consumo* (2013) 201. Against: *Gravato Morais*, *União de Contratos de Crédito e de Venda para o Consumo* (2004) 114 et seq; *Calvão da Silva*, *Venda de Bens de Consumo*⁴ (2010) 98; *Guia*

The new Art 9C CPA, although unfortunately not included in the adequate section of the Sale of Goods Act, settles the issue. The risk is transferred when the consumer acquires the physical possession of the good (Art 9C Par 1), that is with delivery.

4.4. Penalties and remedies

According to Art 24 CRD, ‘Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive’.

In the DOPCA civil and administrative penalties can be distinguished.

The former can be invoked by the consumer against the trader. The latter may lead to the imposition of a fine to the trader. The fine is imposed by the competent authority (see 4.5) and the amount goes to public bodies. Depending on the infringement and its seriousness the fine may vary from 250 EUR to 35,000 EUR.

Regarding civil penalties, if the trader does not comply with the information requirements, the consumer has the right to terminate the contract within 7 days of the conclusion of the contract (in services contracts) or from the day of the delivery (Art 8 Para 4 CPA).

In distance and off-premises contracts, when the consumer exercises the right of withdrawal, if the trader does not

reimburse all payments received from the consumer within 14 days, he must reimburse the double of that amount subsequently (Art 12 Para 6 DOPCA).

The same penalty applies when the trader does not reimburse the consumer after termination of the contract, if he has failed to fulfil his obligation to deliver the goods (Art 9B Para 8 CPA).

Where the trader does not comply with the information requirements related to price, the consumer is not considered bound by such requirements and, therefore, does not have to pay (Art 4 Para 4 DOPCA).

In off-premises contracts, if the trader does not comply with the statutory formal requirements, the contract is null and void (Art 9 Para 1 DOPCA). Only the consumer may rely on that remedy. However, it has already been stated that this issue can be examined *ex officio*.⁷

4.5. Enforcement

Finally, Art 30 DOPCA foresees that the relevant authority which supervises compliance with the provisions of the Act and which has the power to investigate and fine a trader is the *Autoridade de Segurança Alimentar e Económica (ASAE)*, which literally means Authority for the Food and Economical Safety, an agency that holds similar investigatory and fining powers in several other areas of consumer law.

Pereira, Cláusulas Contratuais Abusivas e Distribuição do Risco, Sub Judice (2007) 105; *Aureliano*, O Risco nos Contratos de Alienação (2009) 383; *Moreira da Silva Santos*, Responsabilidade Civil e Garantias no Âmbito do Direito do Consumo (2012) 52.

⁷ *Morais Carvalho*, Manual de Direito do Consumo² (2014) 27 et seq.