

# e-Commerce

*Contributing editor*  
**Robert Bond**



**2018**

GETTING THE  
DEAL THROUGH

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DEAL THROUGH 

# e-Commerce 2018

*Contributing editor*

**Robert Bond**

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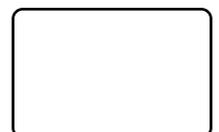


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# Portugal

Leonor Chastre, Duarte Abecasis, Gonçalo Bastos Lopes, Mafalda Ferreira Santos and Paulo Costa Martins\*

Cuatrecasas

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## General

### 1 How can the government's attitude and approach to internet issues best be described?

Over the past decade in particular the Portuguese government has paid special attention to internet issues.

European Union directives regarding electronic communications and consumers' rights (when entering distance or off-premises contracts, including the internet) were transposed into the Portuguese legal system and several initiatives were adopted in order to allow the performance of legal acts online (such as IP rights registration, filing of claims and applications before the courts and before the Commercial Registry, among others).

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## Legislation

### 2 What legislation governs business on the internet?

Law No. 7/2004, 7 January 2004, last amended by Law No. 46/2012, 29 August 2012, transposed into the Portuguese legal system the E-Commerce Directive 2000/31/EC.

Law No. 24/2014, 14 February 2014, last amended by Law No. 47/2014, 28 July 2014, transposed the Consumer Rights Directive 2011/83/EU.

Decree-Law No. 290-D/99, 2 August 1999, last amended by Decree-Law No. 88/99, 9 April 1999, approves the legal framework for electronic documents and digital signatures.

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## Regulatory bodies

### 3 Which regulatory bodies are responsible for the regulation of e-commerce, data protection and internet access tariffs and charges?

In Portugal, the entities in charge of regulating these areas are the Portuguese Data Protection Authority (CNPD), the Portuguese Communications Authority and the Authority for Economic and Food Safety.

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## Jurisdiction

### 4 What tests or rules are applied by the courts to determine the jurisdiction for internet-related transactions or disputes in cases where the defendant is resident or provides goods or services from outside the jurisdiction?

Jurisdiction for internet-related transactions is primarily determined in light of EU Regulation No. 1215/2012 of 12 December 2012 (the Brussels Regulation recast) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. In general, internet-related transactions fall within the scope of consumer contracts, provided one of the parties to the transaction acts for a purpose which can be considered as being outside of his or her trade or profession.

When the consumer enters into a contract with a professional, the former may bring proceedings against the latter in the courts of the member state in which the professional is domiciled or, regardless of the domicile of the professional, in the courts of the place where the consumer is domiciled.

Bearing this in mind, and provided the consumer is domiciled in Portugal, Portuguese courts will have jurisdiction to rule on these cases. Moreover, it is more frequent that this type of dispute is brought before Portuguese courts than before the courts of the member state in which the professional is domiciled, since it represents a more favourable scenario to the consumer as the weaker party in the contract.

It is also worth highlighting that according to both EU and Portuguese civil procedural law, agreements conferring exclusive jurisdiction upon the courts of the place in which the professional is domiciled may be deemed ineffective, since that would entail a breach of a mandatory provision allowing the consumer to bring the proceedings before the courts of the place where the latter is domiciled and would also entail an unjustified and serious inconvenience for the consumer.

If the Brussels Regulation does not apply, Portuguese courts will have jurisdiction to rule on cross-border internet-based transactions provided (i) one of the criteria set out in the Portuguese Code of Civil Procedure applies; (ii) one of the main facts occurred in Portugal; or (iii) in cases where the right invoked by the consumer cannot become effective except by means of an action brought in Portuguese territory or if there is considerable difficulty for the consumer in bringing the proceedings abroad, provided there exists a substantial connection, either personal or in rem, between the matter of the dispute and Portuguese law.

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## Contracting on the internet

### 5 Is it possible to form and conclude contracts electronically? If so, how are contracts formed on the internet? Explain whether 'click wrap' contracts are enforceable, and if so, what requirements need to be met?

Yes. Contracts shall be freely concluded by electronic means and their effectiveness or validity shall not be prejudiced because of the use of that means. Nevertheless, some contracts shall be excluded from the principle of freedom; for example, contracts governed by family law or by the law of succession and contracts concerning rights over real estate, except for rental rights.

Rules governing the formation of contracts will be different if they are business-to-consumer or business-to-business contracts.

For consumer contracts, in practice, the customer submits an offer for the conclusion of a contract by clicking an order button or similar function that must be labelled in an easily legible manner only with the words 'order with obligation to pay' or a corresponding unambiguous formulation indicating that placing the order entails an obligation to pay. Nevertheless, before clicking on such button, the seller must provide to the consumer some pre-contractual information, for example, essential characteristics of the good or service, total price of the good or service (including taxes, transportation expenses, postal or delivery expenses or others, if applicable), contract period and minimum duration of the contract.

If the seller fails to provide this pre-contractual information, the consumer shall not be bound by the contract.

Additionally, the seller must confirm the formation of the contract to the consumer within five days by delivery to the consumer (in a durable medium) of the pre-contractual information identified above and additional information such as the identify of the seller, payment, delivery and execution methods, time limit of the goods delivery or

service provision, existence of the statutory right of withdrawal (if applicable), respective deadline and procedure and delivery of the template withdrawal form, the goods warranties period, existence and conditions of the after-sales services, functionality of the digital contents and their technical protection measures, and the possibility of access to non-judicial means of dispute settlement and the respective competent entities, among others.

For non-consumer contracts, Portuguese law requires that the seller also provides a minimum of unambiguous information to the purchaser before the order is placed, for example, technical steps to follow to conclude the contract, whether or not the concluded contract will be filed by the seller and whether it will be accessible for the purchaser, the language or languages offered for the conclusion of the contract, technical means rendered by the seller for identifying and correcting input errors in the placing of the order and contract terms and general conditions of the contract to be concluded, among others.

After receiving the order, the seller shall promptly acknowledge its receipt by electronic means, except when otherwise agreed with the purchaser. In cases where there is an immediate online provision of the product or service, the acknowledgement of receipt shall be dispensed with. The order shall be deemed final upon being confirmed by the purchaser, following the acknowledgement of receipt.

The contract terms, general conditions and acknowledgement of receipt shall be made available to the recipient in a way that allows him or her to store and reproduce them.

#### **6 Are there any particular laws that govern contracting on the internet? Do these distinguish between business-to-consumer and business-to-business contracts?**

Yes. Law No. 7/2004, 7 January 2004, on e-commerce and Law No. 24/2014, 14 February 2014, on consumers' rights when entering distance and/or off-premises contracts, both referred to in questions 1 and 2.

Law No. 7/2004 applies to business-to-business contracts while Law No. 24/2014 only applies to business-to-consumer contracts. For more information regarding the different legal regime applicable in both diplomas, see question 5.

#### **7 How does the law recognise or define digital or e-signatures?**

Under Portuguese law, the inclusion of a digital signature in an electronic document or in a copy of an electronic document, shall be equivalent to a handwritten signature on written paper documents and shall give rise to the presumption that: the person who included the digital signature is the holder of the signature or is an authorised representative of the legal person that owns the digital signature; the digital signature was included with the intention to sign the electronic document; and the electronic document has not been altered since the digital signature was included therein.

The inclusion of a digital signature shall replace the affixture of paper stamps, rubber stamps, marks or other methods of identifying its holder.

#### **8 Are there any data retention or software legacy requirements in relation to the formation of electronic contracts?**

Whosoever intends to use a digital signature in an electronic document, for the purposes referred to in question 7, shall create or obtain a pair of asymmetric keys and obtain a certificate of the public key issued by a certification agency licensed in accordance with Portuguese legislation.

The certification agencies may only collect the personal data necessary for the conduct of their business and shall obtain such data directly from the persons who hold the pairs of keys and the corresponding certificates, or from third parties from whom such collection has been authorised by the holder.

The personal data collected by the certification agency shall not be used for a purpose other than certification and proper steps shall be taken to prevent the forgery or alteration of the data in certificates.

The evaluation of the conformity of the digital signature products is performed under the 'Common Criteria for Information Technology Security Evaluation', ISO/IEC 15408.

### **Security**

#### **9 What measures must be taken by companies or ISPs to guarantee the security of internet transactions? Is encryption mandatory?**

See question 8.

Additionally, all the measures provided for in Portuguese law (namely in the Electronic Communications Law) regarding communications confidentiality defence, personal data protection and communications safety, will be applicable.

#### **10 As regards encrypted communications, can any authorities require private keys to be made available? Are certification authorities permitted? Are they regulated and are there any laws as to their liability?**

As mentioned in question 8, the use of a digital signature in an electronic document requires the obtainment of a pair of asymmetric keys and of a certificate of the public key, issued by a certification agency licensed in accordance with Portuguese legislation.

The Portuguese legislation on electronic documents and digital signatures regulates the activity of these certification agencies as well as their liability in case of non-compliance with their legal obligations.

### **Domain names**

#### **11 What procedures are in place to regulate the licensing of domain names? Is it possible to register a country-specific domain name without being a resident in the country?**

No specific procedures are in place to regulate such licensing and non-residents in Portugal may apply for the registration of .pt domain names.

#### **12 Do domain names confer any additional rights beyond the rights that naturally vest in the domain name?**

Domain names do not confer any additional rights beyond the rights that naturally vest in the domain name.

#### **13 Will ownership of a trademark assist in challenging a 'pirate' registration of a similar domain name?**

Yes, this is one of the requirements for requesting the deletion or transfer of a .pt domain name. Nevertheless, the following additional requirements must be met:

- the domain name was registered without being based on any rights or legitimate interests previously acquired by its registrant; and
- the domain name was registered and is being used in bad faith. For the purpose of verifying the existence of bad faith, some facts or circumstances, among others, may be used as evidence: the domain name was registered or acquired with a view to later selling it to the claimant; and the domain name was registered expressly in order to disturb the claimant's professional business.

### **Advertising**

#### **14 What rules govern advertising on the internet?**

Advertising on the internet is governed by: general rules inserted in the Portuguese Advertising Code (Decree-Law No. 330/90, 23 October 1990, last amended by Decree-Law No. 66/2015, 29 April 2015); Law No. 7/2004, 7 January 2004; the Civil Institute for Self-Regulation of Commercial Communication (ICAP) Code of Conduct on advertising and other forms of commercial communication; and the Digital Marketing and Online Behavioural Advertising Good Practices Guide of ICAP.

#### **15 How is online advertising defined? Could online editorial content be caught by the rules governing advertising?**

Although Portuguese legislation does not provide a legal definition of online advertising, such type of advertising may be defined as any communication carried out by interactive or digital means, with the purpose of promoting products or services, or influencing the consumer's behaviour.

In cases where online editorial content is promoting products or services or influencing the consumer's behaviour such content will be caught by the rules governing advertising.

## 16 Are there rules against misleading online advertising?

The general prohibition on misleading advertising (Portuguese Advertising Code and Decree-Law No. 57/2008, 26 March 2008, on unfair practices in the relation with the consumer) is also applicable to online advertising.

Any person, including competing traders, with a legitimate interest in opposing the misleading advertising may bring the matter to the attention of the competent authority.

For investigation within the administrative offence procedure, the competent authority may request the advertisers to present evidence of the factual accuracy of the data inserted in the advertising. Such data are presumed inaccurate if such evidence is not presented or is insufficient.

## 17 Are there any products or services that may not be advertised on the internet?

Portuguese law sets forth restrictions relating to the content of advertising (ie, advertising targeted to minors; testimonial advertising; comparative advertising) and to the products that are being advertised (ie, alcoholic beverages, tobacco, treatment and medication, gambling, motor vehicles, among others).

## 18 What is the liability of content providers and parties that merely host the content, such as ISPs? Can any other parties be liable?

Where the intermediary service provider only pursues an activity that consists of the transmission of information in a communication network, or the provision of access to a communication network, not having initiated the transmission, or modified the contents of the messages transmitted, or selected either the information or the receivers, it shall not be liable for the information transmitted.

The intermediary provider of networking communication transmission services that does not modify the contents of the messages transmitted, does not select either the information or the receivers, and that complies with the conditions on access to the information, shall not be liable for the automatic and temporary storage of that information, performed for the sole purpose of making more efficient and economical the information's onward transmission to recipients of the service upon their request. Nevertheless, the common regime of liability shall apply where the provider does not comply with the usual rules of the sector regarding: the updating of the information; and the use of technology to obtain data on the use of the information.

The common rules shall also apply where the provider of networking communication transmission services has obtained actual knowledge of the fact that the information has been removed from its initial source or access to it has been disabled, or that a court or an administrative authority with powers upon the provider who has originated the information has ordered an immediate enforcement action towards such removal or access disablement, and the provider does not act expeditiously to remove or disable access to the information.

The intermediary provider of the server storage service shall only be liable for the information stored, under the common rules, where it has knowledge of an obviously illegal activity or information and does not act expeditiously to remove or to disable access to such information.

Intermediary providers of network content aggregation services, by means of search engines, hyperlinks or similar procedures that allow access to illegal contents, shall be subject to the liability regime that corresponds to that established in the preceding paragraph.

Online intermediary service providers are not under the general obligation to monitor the information that they transmit or store, or to investigate possible offences practised within their scope. However, they have the common duty to comply with several obligations towards the competent authorities, such as, for example, to inform them promptly when becoming aware of illegal activities undertaken via services rendered and to meet requests for the identification of recipients of their services with whom they have entered into storage agreements, among others.

## Financial services

### 19 Is the advertising or selling of financial services products to consumers or to businesses via the internet regulated, and, if so, by whom and how?

Advertising and selling of financial services products to consumers or to businesses via the internet is a regulated activity subject to supervision, depending on the nature of those products, of the Portuguese Central Bank (Bank of Portugal), Portuguese Securities Market Commission or of the Authority for Insurance and Pension Funds.

Decree-Law No. 95/2006, of 29 May 2006, as amended, establishes the legal regime applicable to the distance marketing of consumer financial services, namely the rules applicable to pre-contractual information and contracts concerning financial services rendered to consumers executed through remote communication means by the providers of services engaging their activity in Portugal. Under the terms of such legal regime, providers of services should provide information in a durable medium accessible to the consumer before being bound by any contract or offer. This information must be given in an appropriate and clear manner, in any way appropriate to the means of distance communication used, with due regard, in particular, to the principles of good faith in commercial transactions. The consumer must also be provided information regarding the provider of the service, contractual information and information regarding the financial service itself. Finally, the legal regime also states that consumers should have the right to withdraw from the contract without the necessity of giving any reason and without any claim to compensation or consumer penalty.

## Defamation

### 20 Are ISPs liable for content displayed on their sites?

The Portuguese Law that implemented Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) and article 13 of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (Decree-Law No. 7/2004, of 7 January 2004) sets out different rules according to the different types of activities performed by networking service providers.

Where the intermediary service provider merely pursues an activity that consists of the transmission of information in a communication network, or the provision of access to a communication network, not having initiated the transmission, or modified the contents of the messages transmitted, or selected either the information or the receivers, it shall not be liable for the information transmitted. The exemption from liability shall also apply to the mere technological storage of the information transmitted, in so far as this takes place for the sole purpose of carrying out the transmission and provided that the information is not stored for any period longer than necessary for the transmission.

As a rule, the intermediary provider of networking communication transmission services that does not modify the contents of the messages transmitted, does not select either the information or the receivers, and that complies with the conditions on access to the information, shall not be liable for the automatic and temporary storage of that information, performed for the sole purpose of making the information's onward transmission to recipients of the service upon their request more efficient and economic.

The intermediary provider of the server storage service shall only be liable for the information stored where it has knowledge of an obvious illegal activity or information and does not act expeditiously to remove or to disable access to such information.

The service provider shall be civilly liable where, faced with its knowledge of circumstances, it is or should be aware of the illegal nature of the information.

Intermediary providers of network content aggregation services, by means of search engines, hyperlinks or similar procedures that allow access to illegal contents, shall be subject to this regime.

Intermediary service providers shall promptly inform the competent entities when they become aware of illegal activities undertaken via services rendered by them, otherwise this constitutes an administrative offence and they will be subject to a fine.

Failure to remove or to disable access to the stored information, where intermediary service providers have actual knowledge of its obvious illegal nature, also constitutes an administrative offence, subject to a fine.

Both are punishable even in case of mere negligence. And in case they are carried out by a corporation instead of an individual, the fine may correspond to €6,666 up to a limit of €133,333.

**21 Can an ISP shut down a web page containing defamatory material without court authorisation?**

As stated above, ISPs must remove any material that might be defamatory as soon as they are aware of it, as they do not need court authorisation do to so.

If they do not, they may be subject to the above-mentioned penalty for committing an administrative offence.

**Intellectual property**

**22 Can a website owner link to third-party websites without permission?**

Yes, if the link is to freely available contents that are not restricted.

According to recent Court of Justice of the European Union ruling, a distinction should be made between hyperlinking as works or contents already freely available on the internet and as works or contents that are subject to restrictive accessibility measures, accessible only to restricted users.

In the first case, hyperlinking will not constitute copyright infringement, but in the second case the link is able to circumvent restrictive accessibility measures, therefore making available the works and contents to the general public. This linking practice would be considered a copyright infringement.

**23 Can a website owner use third-party content on its website without permission from the third-party content provider? Could the potential consequences be civil in nature as well as criminal or regulatory?**

A website owner can only use third-party content on its website without permission from the third-party content provider if such third-party content is freely available. Otherwise, consequences could include civil, criminal and regulatory liability.

**24 Can a website owner exploit the software used for a website by licensing the software to third parties?**

A website owner can only exploit the software if such use is licensed by the software owner. In Portugal, software is protected by copyright if it is a creative work (ie, not a simple copy of another already created).

**25 Are any liabilities incurred by links to third-party websites?**

Yes, if such links are to works or contents that are subject to restrictive accessibility measures and therefore accessible only to restricted users (eg, subscribers of an on-demand internet streaming media service).

**26 Is video content online regulated in the same way as TV content or is there a separate regime?**

Regarding intellectual property rights, both video content online and TV content have similar regulations, since they may be considered copyright-protected works and contents protected by related rights.

On-demand audiovisual media service (ie, a non-linear audiovisual media service), like video-on-demand, meaning an audiovisual media service provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his or her individual request on the basis of a catalogue of programmes selected by the media service provider, is regulated by Law No. 27/2007 of 30 July 2007, the same law that regulates television broadcasting activities, implementing Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in member states concerning the pursuit of television broadcasting activities.

**27 Do authorities have the power to carry out dawn raids and issue freezing injunctions in connection with IP infringement?**

Yes.

**28 What civil remedies are available to IP owners? Do they include search orders and freezing injunctions?**

IP owners may request an indemnification for damages: amount of loss of profits and damages (patrimonial and non-patrimonial), amount of profits (unjust enrichment), costs and expenses related to the necessary procedures for protection, investigation and termination of the infringements.

In case it is not possible to determine the damages effectively suffered and the relevant rights owner does not oppose, the competent court may grant compensation assessed, *ex aequo et bono*, in the amount of 'royalties' or compensation that would be equitably paid by the infringer to the rights owner, should the respective licence have been granted, accrued by costs and expenses related to the procedures performed for protection of the rights, investigation and termination of the infringements.

Search orders and freezing injunctions are admissible, as well as summary injunction (interlocutory injunction), provisional cease and desist orders, provisional product seizure or delivery, and provisional seizure of moveable and immovable assets of the infringer.

The competent courts may also order if requested by the interested parties, such as owners or licensees of IP rights:

- measures to obtain evidences controlled or in possession of the other party (infringing party), or of third parties;
- measures for urgent and adequate preservation of evidence of violation of rights (may include obtaining samples of the infringing products); and
- presentation of evidence by the infringer or a third party, including providing detailed information about the origin and distribution network of the products.

**Data protection and privacy**

**29 How does the law in your jurisdiction define 'personal data'?**

According to the Law No. 67/98 of 26 October 1998 on the Protection of Personal Data (transposing into the Portuguese legal system Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data), personal data shall mean any information of any type, irrespective of the type of medium involved, including sound and image, relating to an identified or identifiable natural person (data subject).

Directive 95/46/EC is repealed by Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation (GDPR)), with effect from 25 May 2018.

The aforementioned Law No. 67/98 includes a category of 'sensitive data', defined as personal data revealing philosophical or political beliefs, political party or trade union membership, religion, private life and racial or ethnic origin, and data concerning health or sex life, including genetic data. The processing of personal data shall be prohibited.

Special legitimacy conditions, such as obtaining the consent of the data subject, for example, shall be fulfilled to process sensitive personal data and this processing shall be previously authorised by the CNPD.

Anonymisation can be used according to Portuguese law to make data non-personal and avoid regulation.

**30 Do parties involved in the processing of personal data, such as website owners, have to register with any regulator to process personal data?**

Yes, at present and according to the aforementioned Law No. 67/98, such parties should notify the CNPD of the processing of personal data made pursuant to the use and management of the website, or request authorisation for the processing depending, for example, on the categories of data processed or on combination of data.

Law No. 67/98 does not prescribe the appointment of an in-house data protection officer. However, the GDPR sets forth that the controller

and the processor shall designate a data protection officer in any case where (i) the processing is carried out by a public authority or body, except for courts acting in their judicial capacity; (ii) the core activities of the controller or the processor consist of processing operations which, by virtue of their nature, their scope or their purposes, require regular and systematic monitoring of data subjects on a large scale; or (iii) the core activities of the controller or the processor consist of processing on a large scale of special categories of data pursuant to article 9 of the GDPR and personal data relating to criminal convictions and offences referred to in article 10 of the GDPR.

The data protection officer may be a staff member of the controller or processor, or fulfil the tasks based on a service contract.

### 31 Could data protection laws and regulatory powers apply to organisations or individuals resident outside of the jurisdiction?

Law No. 67/98 shall apply to the processing of personal data carried out:

- in the context of the activities of an establishment of the controller on Portuguese territory;
- outside national territory, but in a place where Portuguese law applies by virtue of international public law; and
- by a controller who is not established on European Union territory and who for purposes of processing personal data makes use of equipment, automated or otherwise, situated on Portuguese territory, unless such equipment is used only for purposes of transit through the territory of the European Union.

If an internet company's server is located outside the Portuguese jurisdiction, several restrictions on the transfer of personal data are applicable, especially transfer to a state that is not a member of the European Union, including assuring an adequate level of protection of the data transferred by entering into adequate data processing agreements, data transfer agreements, binding corporate rules and fulfilling at least one condition to legitimate the transfer, such as consent of the data subjects, for example.

The GDPR applies to the processing of personal data of data subjects who are in the European Union by a controller or processor not established in the European Union, where the processing activities are related to:

- the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the European Union; or
- the monitoring of their behaviour as far as their behaviour takes place within the European Union.

### 32 Is personal data processed on the basis of customer consent or other grounds? What is the commonly adopted mechanism for obtaining customer consent or establishing the other grounds for processing?

Personal data may be processed on the basis of unambiguous customer consent or if processing is necessary, for example, for the performance of a contract or contracts to which the data subject is party, or in order to take steps at the request of the data subject prior to entering into a contract, for compliance with a legal obligation of the controller, to protect the vital interests of the data subject if the latter is physically or legally incapable of giving his or her consent, for pursuing the legitimate interests of the controller or the third party to whom the data are disclosed, except where such interests should be overridden by the interests for fundamental rights, freedoms and guarantees of the data subject.

Pursuant to the GDPR, personal data may also be processed on the basis of consent that should be given by a clear affirmative act establishing a freely given, specific, informed and unambiguous indication of the data subject's agreement to the processing of personal data relating to him or her, such as by a written statement, including by electronic means. Where processing is based on the data subject's consent, the controller should be able to demonstrate that the data subject has given consent to the processing operation.

Pursuant to the GDPR, personal data may also be processed on other grounds besides consent of the data subject: for example, if processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract, for compliance with a legal obligation to which the controller is subject, if processing is necessary in order to

protect the vital interests of the data subject or of another natural or if processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

### 33 May a party involved in the processing of personal data, such as a website provider, sell personal data to third parties, such as personal data about website users?

In principle, this is not legal according to Portuguese law, except in cases where at least one of the legitimacy conditions listed in the answer to question 32 is fulfilled. The same practices will also be prohibited according to the GDPR.

### 34 If a website owner is intending to profile its customer base to carry out targeted advertising on its website or other websites visited by its customers, is this regulated in your jurisdiction?

Yes, this is regulated in the Portuguese jurisdiction and there is a general opt-in approach to the use of cookies. Additionally, the GDPR sets forth that a data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning or similarly significantly affecting him or her.

### 35 Does your jurisdiction have data breach notification or other cybersecurity laws specific to e-commerce?

The Portuguese jurisdiction has data breach notifications foreseen in Law No. 46/2012 of 29 August 2012, concerning the processing of personal data and the protection of privacy in electronic communications. Data breach notifications are also provided in broader terms in the GDPR. The Portuguese jurisdiction also has a Cybercrime Law approved by Law No. 109/2009, of 15 September 2009, concerning attacks against information systems that transposed into national law the Council of Europe Convention on Cybercrime.

### 36 Does your jurisdiction recognise or regulate the 'right to be forgotten'?

Yes. This right is also included and strengthened in the GDPR.

### 37 What regulations and guidance are there for email and other distance marketing?

There is an opt-in approach in Portuguese law for email and other distance marketing, including unsolicited marketing, when natural persons are involved and an opt-out approach when the messages are sent to legal persons, such as companies.

### 38 What rights and remedies do individuals have in relation to the processing of their personal data? Are these rights limited to citizens or do they extend to foreign individuals?

The following rights of data subjects are included in Portuguese law in relation to the processing of their personal data: data quality, right to information, access, rectification and opposition.

The GDPR also refers expressly to the right to erasure (right to be forgotten), right to restriction of processing, right to data portability and right to object to automated individual decision-making.

The following remedies are available to data subjects in relation to the processing of their personal data: submitting a claim to CNPD; civil liability and compensation; right to an effective judicial remedy against a supervisory authority, like CNPD; and the right to an effective judicial remedy where a data subject considers that his or her rights have been infringed.

The above-mentioned rights and remedies may extend to foreign individuals if Portuguese law is applicable, as described in question 31.

The GDPR strengthens individuals' remedies, as well as controllers and processors' liabilities and penalties.

## Taxation

### 39 Is the sale of online products subject to taxation?

For Portuguese VAT purposes, two different situations should be distinguished: the supply of goods or services ordered through the internet,

### Update and trends

The GDPR and the Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (the Regulation on Privacy and Electronic Communications) will impact in a very positive manner all businesses and activities, including e-commerce. Both regulations are key actions to increase trust in and the security of digital services. By strengthening data subjects' rights and enabling enforcement of such rights in easier and more accessible manners, namely by vastly increasing the administrative fines, these regulations will provide a high level of protection of fundamental rights and freedoms, in particular the respect for private life, confidentiality and the protection of personal data, including in, but without being limited to, the electronic communications sector.

to which general VAT rules apply; and the supply of online products (for instance, hosting websites, internet downloadable software, images, e-books, music and games, software maintenance, e-learning services), which is qualified as electronic supply of services (electronically supplied services).

Concerning electronically supplied services, one should consider that EU Directive 2008/8/EC was transposed into domestic law. Accordingly, in B2C transactions, Portuguese VAT applies if the service supplier is an EU VAT taxpayer or a non-EU entity if the consumption of the services occurs in Portugal. In B2B transactions, Portuguese VAT applies if the acquirer is a Portuguese VAT taxpayer.

The Portuguese VAT rate applicable to these services is the standard rate of 23 per cent.

For tax purposes, as for any other kind of income, income arising from the supply of goods or services ordered through the internet or from electronically supplied services, may be subject to corporate or personal income tax in Portugal in the case of resident suppliers (taxed on a worldwide basis), or in the case of non-resident suppliers if the services or goods are supplied through a permanent establishment (PE) located in Portugal or in cases of Portuguese-sourced income other than business profit from the sale of goods (for instance, income qualified as royalties, which is liable to withholding tax herein).

#### 40 What tax liabilities ensue from placing servers outside operators' home jurisdictions? Does the placing of servers within a jurisdiction by a company incorporated outside the jurisdiction expose that company to local taxes?

Portuguese resident companies are subject to corporate income tax on a worldwide basis (ie, including over the income obtained outside of Portugal). Corporate income taxation in other jurisdictions is also expectable, but it has to be confirmed on a case-by-case basis.

Non-resident companies using servers placed in Portugal in connection with supply of goods or services ordered through the internet or electronically supplied services (including internet service providers) may be liable to Portuguese corporate income tax, for instance, if they are seen as carrying out the activity in Portugal through a PE, and, in limit, that the server by itself is considered a PE located within the Portuguese territory.

In general terms, the relevant PE concept follows that of the OECD Model Tax Convention, and is defined as a fixed place of business through which the business of an enterprise is wholly or partly carried on, excluding the undertaking of preparatory or auxiliary activities.

According to the commentaries of the OECD Model Tax Convention, a server may in certain cases be considered as a PE. Although the Portuguese tax authorities have not issued a clear position on this matter, one should consider that Portugal included an observation to paragraphs 42.1 to 42.10 of the commentaries to the OECD Model Tax Convention (which address PE issues in relation with e-commerce), reserving its right not to follow the position expressed therein. Accordingly, we cannot exclude that the Portuguese tax authorities may try to consider that the use of a server in Portugal may give rise to the existence of a PE in cases where, according to the commentaries, one would conclude otherwise.

#### 41 When and where should companies register for VAT or other sales taxes? How are domestic internet sales taxed?

In general terms, resident companies and PEs of non-residents should register for VAT purposes upon beginning of activity. In certain cases, non-resident companies without a PE may also be required to register in Portugal for VAT purposes.

While B2B general rules apply, concerning B2C electronically supplied services one should consider that EU Directive 2008/8/EC was transposed into domestic law. Accordingly, both EU and non-EU suppliers may opt to register in Portugal under the 'MOSS' (mini one-stop shop) mechanism, unless they opt to register (or remain registered) in another EU member state for the same purposes.

Domestic electrical supplies of services are subject to Portuguese VAT at a rate of 23 per cent.

#### 42 If an offshore company is used to supply goods over the internet, how will returns be treated for tax purposes? What transfer-pricing problems might arise from customers returning goods to an onshore retail outlet of an offshore company set up to supply the goods?

This should be analysed case by case.

### Gambling

#### 43 Is it permissible to operate an online betting or gaming business from the jurisdiction?

Yes, since June 2016 online gambling (sports betting and casino games) has been allowed in Portugal.

#### 44 Are residents permitted to use online casinos and betting websites? Is any regulatory consent or age, credit or other verification required?

Yes, if the website is duly authorised to operate in Portugal; there is verification of the identity of the players to ensure that the underage and self-excluded cannot play; and there is verification of the payment accounts indicated by players before any payments are made. These are the operator's obligations.

### Outsourcing

#### 45 What are the key legal and tax issues relevant in considering the provision of services on an outsourced basis?

The Portuguese legal framework does not provide a specific regulation for outsourcing agreements, which means that the legal provisions applicable to these kinds of agreements are the general rules set forth in the Civil Code for the rendering of services agreements (although limited to those provisions where such services are rendered against a certain payment). Nevertheless, there are several legal regimes that, in one way or another, address outsourcing activities. Given this lack of basic regulation, the importance of the contractual dispositions agreed by the parties is greatly enhanced, which reinforces the need to have a careful and detailed contractual framework with clauses addressing the specific interests and intentions of the parties. In this regard, it is very important to accurately define relevant contractual matters such as penalty conditions, termination clauses, labour relations between the parties' collaborators or employees, confidentiality clauses and data protection, among others.

From a tax perspective, in general, direct and indirect taxation rules applicable to the supply of services also apply to the outsourcing of services. Therefore, each specific situation should be analysed on a case-by-case basis.

#### 46 What are the rights of employees who previously carried out services that have been outsourced? Is there any right to consultation or compensation, do the rules apply to all employees within the jurisdiction?

The rights of these employees will vary depending on whether or not the outsourcing of the services can be deemed as a transfer of undertaking (transfer of autonomous business unit as defined in the Acquired Rights Directive 2001/23/EC, transposed to Portuguese legislation by means of incorporation into the Labour Code).

If the outsourcing can be deemed as a transfer of undertaking, these employment relations will automatically transfer to the outsourcing provider.

When the outsourcing of services does not imply a transfer of undertaking, unless employment may continue in other functions or premises, employment relations must be terminated under an objective dismissal procedure.

Both the transfer of employment relation and termination of employment will imply information and consultation of the affected employees and compensation will only be due in case of termination of employment. Legal provisions and entitlements will apply to all employees in the jurisdiction affected by the outsourcing of the services.

The regimes and procedures applicable to transfer and termination of employment relations and consultation and compensation obligations are ruled in detail in the Portuguese Labour Code.

Finally, it should be noted that collective bargaining agreements may in some situations rule differently, namely by establishing the obligation to transfer employment relations even if the situation does not qualify as a transfer of an undertaking.

#### Online publishing

##### 47 When would a website provider be liable for mistakes in information that it provides online? Can it avoid liability?

A website provider may be liable when it provides unclear, inaccurate and untrue information to consumers, in case of defamation or in case of illegal advertising, for example. To avoid liability the website provider shall make a previous legal assessment of all the contents, material and information that it provides online.

##### 48 If a website provider includes databases on its site, can it stop other people from using or reproducing data from those databases?

Yes, if it is the owner of the IP rights related with such database. According to Portuguese law, databases may be considered a work protected by copyright, if original and creative. If a specific database is considered a copyright-protected work, it is protected against illegal and non-authorized use and reproduction.

Portuguese law also grants a special protection to the maker of a database.

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## Getting the Deal Through

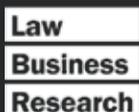
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