

e-Commerce

Contributing editor
Robert Bond



2019

GETTING THE
DEAL THROUGH

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e-Commerce 2019

Contributing editor

Robert Bond
Bristows LLP

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Preface

e-Commerce 2019

Fifteenth edition

Getting the Deal Through is delighted to publish the fifteenth edition of *e-Commerce*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Argentina, Indonesia, Mexico, Norway and Spain.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Robert Bond of Bristows LLP, for his continued assistance with this volume.

GETTING THE 
DEAL THROUGH

London
July 2018

Portugal

Sónia Queiróz Vaz, Duarte Abecasis, Paulo de Sá e Cunha, Paulo Costa Martins,
Gonçalo Bastos Lopes and Mafalda Ferreira Santos*

Cuatrecasas

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 consumer rights (when entering into distance or off-premises contracts, including online) 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).

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, approved the legal framework for electronic documents and digital signatures.

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.

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 that 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 that the consumer is domiciled in Portugal, Portuguese courts will have jurisdiction to rule on these cases.

Moreover, it is more common 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 for 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 that: (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 the Portuguese territory or where there is considerable difficulty for the consumer in bringing the proceedings abroad, there exists a substantial connection, either personal or in rem, between the matter of the dispute and Portuguese law.

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 such button, the seller must provide to the consumer some pre-contractual information – for example, essential characteristics of the goods or services, 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 identity of the seller, payment,

delivery and execution methods, time frame for delivery of the goods or provision of the services, existence of the statutory right of withdrawal (if applicable), respective deadline and procedure and delivery of the template withdrawal form, the goods' warranties, existence and conditions of 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 provide a minimum of unambiguous information to the purchaser before the order is placed – for example, technical steps to follow to conclude the contract, whether the concluded contract will be filed by the seller and whether it will be accessible to 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 into 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 regimes applicable in both contexts, 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 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 that hold the pairs of keys and the corresponding certificates, or from third parties from which 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 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 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 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 must have been registered without being based on any rights or legitimate interests previously acquired by the registrant; and
- the domain name must have been registered and used in bad faith. For the purpose of verifying the existence of bad faith, the following facts or circumstances, among others, may be used as evidence including if: the domain name was registered or acquired with a view to later selling it to the claimant or was expressly registered 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, this 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 consumer behaviour.

In cases where online editorial content is promoting products or services or influencing consumer 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 relations with consumers) 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. This data is 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 an intermediary service provider only pursues an activity that consists of the transmission of information through a communication network, or the provision of access to a communication network, and has not initiated the transmission, or modified the contents of the messages transmitted, or selected either the information or the recipients, it shall not be liable for the information transmitted.

An 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 recipients, and 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 that access to it has been disabled, or that a court or an administrative authority with powers over the provider which 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.

An intermediary provider of a 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 disable access to such information.

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

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

The 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), the Portuguese Securities Market Commission or the Authority for Insurance and Pension Funds.

Decree-Law No. 95/2006, 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 he or she is 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 with 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 need to give 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 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 (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 recipients, 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, insofar 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, an 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 recipients, and 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.

An intermediary provider of a 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 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 content, 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 disable access to the stored information, where intermediary service providers have actual knowledge of its obviously

illegal nature, also constitutes an administrative offence, subject to a fine.

Both are punishable even in cases of mere negligence. And where they are carried out by a corporation instead of an individual, the fine may correspond to between €6,666 and an upper €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 content that is not restricted.

According to a recent Court of Justice of the European Union ruling, a distinction should be made between hyperlinking to works or content already freely available on the internet and to works or content 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 may be able to circumvent restrictive accessibility measures, therefore making available the works and content 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 existing work).

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

Yes, if such links are to works or content that is 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 are governed by similar regulations, since they may be considered copyright-protected works and content protected by related rights.

On-demand audiovisual media service (ie, a non-linear audiovisual media service), such as 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;
- lost profits and damages (patrimonial and non-patrimonial);
- an amount of the infringers' profits (unjust enrichment); and
- costs and expenses related to the necessary procedures for protection, investigation and termination of the infringement.

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

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 immoveable assets of the infringer.

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

- measures to obtain evidence controlled or in the possession of the other party (infringing party), or of third parties;
- measures for urgent and adequate preservation of evidence of violation of rights (including samples of the infringing products); and
- presentation of evidence by the infringer or a third party, including 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 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 medium involved, including sound and images, relating to an identified or identifiable natural person (data subject).

Directive 95/46/EC was 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)), which came into effect on 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 is prohibited.

Special legitimacy conditions, such as obtaining the consent of the data subject 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 the 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, scope or 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 the Portuguese territory;
- outside the national territory, but in a place where Portuguese law applies by virtue of international public law; or
- by a controller which is not established on the European Union territory and which for purposes of processing personal data makes use of equipment, automated or otherwise, situated on the 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 transfers 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 legitimise the transfer, such as consent of the data subjects.

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 insofar as that 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, to comply 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, or to pursue the legitimate interests of the controller or the third party to which the data is disclosed, except where such interests should be overridden by the interests of 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, to comply 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 question 32 is fulfilled. The same practices are also 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?

Data breach notifications are 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, 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 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 the CNPD; civil liability and compensation; right to an effective judicial remedy against a supervisory authority, such as the 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, to which general VAT rules apply; and the supply of online products (for instance, hosting websites, downloadable software, images, e-books, music and games, software maintenance and 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 has been transposed into domestic law.

Update and trends

From a tax standpoint, one should consider the impact of the Organisation for Economic Co-operation and Development (OECD) project to tackle base erosion and profit shifting (BEPS). Some developments took place regarding Action 1 of the BEPS Report of 5 October 2015, aimed at 'Addressing the Tax Challenges of the Digital Economy', as it called the attention to the issues derived from the development of the digital economy, especially to its business models' key features, with potential tax relevance.

An issue of particular relevance in the digital economy was the agreement to modify the list of exceptions to the permanent establishment (PE) definition to ensure that each of the exceptions included in article 5(4) of the OECD Model Convention is restricted to activities that are otherwise of a 'preparatory' or 'auxiliary' character, and to introduce a new anti-fragmentation rule to tackle unintended use of these exceptions through fragmentation of business activities among closely related enterprises.

In particular, the option to modify the exceptions to PE status in order to ensure that they are available only for activities that are of a 'preparatory' or 'auxiliary' nature was also adopted as a result of Action 7 of the BEPS Report of 5 October 2015, and is expected to be implemented across the Portuguese tax treaty network via the conclusion of the multilateral instrument that modifies bilateral tax treaties under Action 15.

Although the impact of the OECD's initiatives is already being seen, the Portuguese government did not include in the State Budget for 2018 new measures of taxation of the digital economy, as it is still

waiting for other EU member states to pursue that initiative.

Nonetheless, in September 2017, Portugal joined the proposal led by France, together with Germany, Italy and Spain, to move forward with a model for taxation of the digital economy, the practical effects of which are still to be seen.

Additionally, one should note that on 21 March 2018, the European Commission presented two Directive proposals in order to achieve a fairer taxation of digital activities in the EU.

The first initiative aims to reform corporate tax rules so that profits are registered and taxed where businesses have significant interaction with users through digital channels (which constitutes the Commission's preferred long-term solution). The second proposal responds to calls from several member states for an interim tax that covers the main digital activities that currently escape tax altogether in the EU. These are still at the 'proposal' stage, and thus still need to be approved and enter into effect, as well as then transposed into the Portuguese legislation.

The Commission further proposed, on 10 January 2017, a Regulation on Privacy and Electronic Communications to update the rules to technical developments and to adapt them to the GDPR which entered into force in May 2018. The proposal for the e-Privacy Regulation complements the GDPR in the electronic communications sector. The objective is to reinforce trust and security in the Digital Single Market. This means stronger privacy rules for electronic communications, an update of existing rules and protection of information on users' devices that strongly impacts e-commerce.

Accordingly, in business-to-consumer 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 business-to-business 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 PE located in Portugal or in the case of Portuguese-sourced income other than business profits 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 on income obtained outside of Portugal). Corporate income taxation in other jurisdictions may also be expected, but must be confirmed on a case-by-case basis.

Non-resident companies using servers placed in Portugal in connection with the 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 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 122 to 131 of the commentaries to the OECD Model Tax Convention (which address PE issues in relation to e-commerce), reserving its right not to follow the position expressed therein. Accordingly, we cannot exclude that the Portuguese tax authorities may 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 activity. In certain cases, non-resident companies without a PE may also be required to register in Portugal for VAT purposes.

While business-to-business general rules apply, concerning business-to-consumer electronically supplied services one should consider that EU Directive 2008/8/EC has been transposed into domestic law. Accordingly, both EU and non-EU suppliers may opt to register in Portugal under the Mini One-Stop Shop mechanism, unless they opt to register (or remain registered) in another EU member state for the same purposes.

Domestic electronic 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 on a case-by-case basis.

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 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 into 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 relations 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. Under the transfer of undertaking regime, employees have special rights of opposition to the transfer of the employment contract or termination for cause. 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 set out in detail in the Portuguese Labour Code.

Finally, it should be noted that collective bargaining agreements may in some situations provide differently, namely by establishing the obligation to transfer employment relations even if the situation does not qualify as a transfer of 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 or untrue information to consumers –where there is defamation or illegal advertising, for example. To avoid liability, the website provider should make a legal assessment of all the content, 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 to 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-authorised use and reproduction.

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

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