

Doing Business over the Internet

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Doing Business over the Internet

I. Introduction

We have seen the Internet grow exponentially over the last few years. Change is here and we must be prepared to embark in one of the most extraordinary events since the industrial revolution of the XIX century.

The way we will do business will change dramatically and will affect everybody. The Internet is no longer a dream of the mid nineties when the first e-companies started to operate.

Companies doing business over the Internet are becoming multinational giants and are dominating the stock markets in the US. The same trend has swept Europe over the past months spite the recent turmoil in the securities markets. The initial public offerings of Terra, the portal of Telefónica de España, and of PT Multimedia, the Portugal Telecom S.A. subsidiary controlling the Portuguese incumbent's investments in multimedia, e-commerce, Internet services and cable television, had an extraordinary success.

As in every economic activity there are always legal issues involved in the development of businesses that use the Internet and we are only beginning to grasp the full extent this movement. Most lawyers, as with so many other things, have not yet understood that times are changing. However, in Silicon Valley, law firms are being paid in shares and/or options of the so-called "dotcoms". These west coast firms know that a lot is at stake and that appropriate steps have to be taken to ensure that the digital revolution is not stopped by legal encumbrances.

Doing business over the Internet involves several legal issues, namely:

- contractual issues;
- copyright and intellectual property issues;
- advertising; and
- data protection.

Saying that the Internet is “unregulated” is not true and may prove, in the future, to be the source of trouble for dot companies if they do not take care in complying with the laws and regulations of the countries where they do business. This fallacy has its origin in what we could call “off-line” legal thinking. In other words, there is a general belief that sites may be regulated by the laws of the countries where they are located or where its owners reside, which are the only countries where they can be sued. However, this is not true. Sites are also regulated by the laws and regulations of the countries where its users are located.

This article describes some of the legal aspects of doing business over the Internet in Portugal. However, even from a Portuguese law perspective the issue involves several legal issues that can only be dealt with from an international perspective as Portuguese sites will be subject to the laws of foreign jurisdictions and Portuguese consumers have rights against foreign site owners.

II. Purpose of the site and international law issues

Sites may be created for a variety of purposes:

- provide information;
- market products or services; or
- offer products and services online.

When a site is created and made accessible to users, the site owner will enter into a legal/contractual relationship with all users that access the site. In most cases, this is of little or no consequence. However, it must be noted that the moment one uploads the site to its host Internet service provider, the site owner will immediately make the site accessible to users all around the world. This has an important legal consequence: the site owner will be subject to the legislation of all countries of the world.

For this reason, it is customary for the site owners to include a section establishing the legal terms of use. The legal terms of use should define the purpose of the site, so that it is made clear to all users the scope of the information that is provided online. For instance, if the site is created to provide general information of a listed company, all information posted will fall within the supervision of the securities authorities of the country where it is listed and must comply with the requirements stated in the legislation of such jurisdiction(s). In Portugal, those include the obligation to provide accurate and true information about the company’s business activities.

Care must also be taken when the site owner is a regulated entity, as the products and services that are being described may fall within specific laws of its own jurisdiction. For instance, only financial companies registered with the Portuguese securities commission can offer online financial services in Portugal. If a foreign entity offers banking services without being registered with the Bank of Portugal, its activities will fall under articles of ... and will be subject to penalties.

Another example concerns law firms which are not allowed to advertise in Portugal and can only offer online legal services to their clients. Therefore, sites of Portuguese law firms can only give a general description of the practice and cannot disclose the names of clients or the transactions in which the firm was involved. Foreign law firms, on the other hand, will fall within the jurisdiction of the Portuguese law society if they offer to advise on Portuguese law.

These examples show the need to describe the site owner's business and the nature and purpose of the site.

If the site was created to market products and services it will fall within each country's advertising laws. It can be argued that users of "marketing sites" will enter into a contract or, at least, into a legal relationship with the site owner the moment they access the site where certain products and services are being displayed. For instance, if the site owner advertises that it can deliver its products to any place around the world in any certain given time and this is not accurate. It can be liable under certain jurisdictions' advertising laws.

Typically, sites will include in it legal terms, disclaimer or other type of legal notice, whereby the site owner shall state that any issue arising or in connection with the site will be subject to the laws of the country of incorporation or origin of the site owner. However, this offers only limited protection against potential infringements as each country has a different set of rules and regulations that may apply to the site irrespectively of the governing law chosen by the site owner.

The Republic of Portugal is a party to the Rome Convention on Contracts as well as to the Brussels Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters of 1968. Therefore, the Portuguese courts will uphold: (i) the choice of law, and (ii) the award passed by foreign courts.

However, Portuguese policy rules (in the sense of article 7 of the Rome Convention) shall prevail and Portuguese law shall apply to

- the capacity of Portuguese nationals to enter into any contracts. Portuguese law shall also apply to certain intellectual property rights.
- the offer of regulated services, such as financial services, or products, such as food and drugs;
- consumer protection;
- advertising;
- use of personal data; and
- intellectual property protection.

One practical way of limiting the potential exposure will be to clearly state the territories where the products are being offered. The EU site owners should be concerned with the implications of offering its products in the US or in other EU countries and should ascertain carefully on the applicability of specific legislation. In most cases, the harmonisation of legislation within the EU will simplify this task and the rules on advertising, data protection or intellectual property will be similar in the EU. The most critical situations will arise when it intends to provide services or products in the US or in EU regulated markets where legal requirements may vary from country to country. For instance, financial services can only be provided under the Investment Services Directive (“ISD”) and other European directives on financial and banking services, if the financial company applies for the so-called single passport that will enable it to provide services within the EU territories.

On the other, a US broker will not be allowed to offer online brokering services in the European Union Countries (“EU”) unless it obtains a brokerage license in on of the EU member countries and applying for a single passport as mentioned above. Otherwise, it should clearly state that non-US residents are not allowed to use the service and bar access to the service, but not to the information, provided by the site.

III. Contractual Issues

1. Online Contracts

When services and products are being offered online, Portuguese law and, we assume, most jurisdictions would consider that an invitation to enter into a contract with all users that access the site exists. Therefore, the site owner will be committing to certain obligations concerning the suitability and quality of the product or service, to delivery time etc. as stated in the specific

product/service pages as well as under the legal terms stated in a separate page.

On the other hand, the consumer or user will be accepting the terms of use simply by clicking the appropriate box pursuant to article 217 of the Portuguese Civil Code enacted by Decree-Law 47344 of 25 November 1966 as amended (Código Civil – the “Civil Code”). Notwithstanding the above, we understand that the consumer would also express his/her/its acceptance of the contract terms by any actions that imply an acceptance the contract terms.

Online contracts will be admissible as evidence under Portuguese law, pursuant to article 515 of the Portuguese Code of Civil Procedure approved by Decree-Law 44129 of 28 December 1961 as amended (Código de Processo Civil – “Code of Civil Procedure”).

There are no general requirements as to the language or form of the Consumer Agreement. The agreement should be drafted in intelligible and accurate language pursuant to Law 24/96 of 22 August 1996 (Lei de Defesa do Consumidor - the “Consumer Protection Law”) and Decree-Law 220/95 of 31 August 1995 (Lei das Cláusulas Contratuais Gerais - the “Contract General Terms Law”). In any event, we advise that agreements that are to applicable to Portuguese consumers be translated to Portuguese so as to give the consumers adequate protection and understanding of its content under article 5 of the Contract General Terms Law and article 7 of the Consumer Protection Law.

2. Liability Issues

Liability of the producer for damages (personal injury, death and material damages) caused defective products pursuant to the provisions of Decree-Law 383/89 cannot be excluded. Portuguese courts would also deem null and void any clause excluding the liability for damages and loss of profit that result from the breach of contract pursuant to article 809 of the Civil Code. The same would apply to the so-called “cláusulas penais” that limit the liability of the parties by establishing penalties for breach if such penalty is considered unfair or grossly disproportionate (articles 810 and 812 of the Civil Code).

However, parties may limit their liability by establishing indemnification clauses that purport to cover the damages and losses suffered in case of breach.

Typically, the legal terms shall include clauses limiting the site’s liability.

3. Consumer protection

The Product Liability Directive was implemented by Decree-Law 383/89 of 6 November 1989 (the “Defective Products Law”). The Defective Products Law establishes a maximum compensation for damages caused by defective products and not a minimum amount as provided in article 16 of the Directive.

IV. Advertising Laws

The Directive on misleading advertising was implemented by Decree-Law 330/90 of 23 October 1990, as amended by Decree-Law 74/93 of 10 March 1993, Decree-Law 6/95 of 17 January 1995 and Decree-Law 275/98 of 9 September 1998 (Código da Publicidade - the “Advertising Code”).

Under article 260 of Decree-Law 16/95 of 24 January 1995 (Código da Propriedade Industrial - the “Industrial Property Code”) false indications as to the source or quality of products may also be considered as unfair competition. Law 6/99 of 27 January 1999 (Lei da Publicidade Domiciliária – the “Home Advertising Law”) provides on the advertising delivered at the domicile of the consumer. It is not applicable to advertising by means of electronic mail. The distribution of non-addressed advertising is not allowed provided that the recipient clearly refuses its delivery. The sending of addressed advertising is not allowed provided that the recipient has refused to receive any advertising material. The infringement of these provisions determines the payment of penalties.

The Consumer Protection Law also establishes an obligation of information on the characteristics of the products. The supplier of the product may be liable towards the consumer for any damages caused due to the violation of such obligation of information. Any breach in the information or if it is insufficient or ambiguous allows the consumer to terminate the agreement within 7 days of the date of closing of the agreement.

V. Data Protection Issues

The Data Protection Directive was implemented by Law 67/98 of 26 October 1998 (the “Data Protection Law”). The Data Protection Law contains a definition of “data interconnection” that is not included in the Data Protection Directive.

Notice must be given to the national supervisory authority (Comissão Nacional de Protecção de Dados - “CNPD”) before initiating the processing

of personal data. Such notice should include reference to the elements mentioned in article 19 of the Data Protection Directive as well as any potential interconnection of personal data, the period of time during which the data will be held by the processor and conditions of the access by the data subjects to the data relating to them (article 29 of the Data Protection Law). Processing of sensitive data requires previous authorisation of CNPD (article 28 of the Data Protection Law).

The transfer of personal data to EU member States is not subject to any restrictions, save for the consent of the data subject for the processing of such data. The transfer of personal data to non-EU Member States shall take place only if the third country ensures an adequate level of protection, which shall be assessed by CNPD and communicated to the European Commission or in accordance with an authorisation granted by CNPD to particular cases (article 19 and 20 of the Data Protection Law).

Subject to safety restrictions, data relating to racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, health or sex life cannot be transferred unless the data subject has given his explicit consent to such processing or the occurrence of an exceptional situation (article 8 of the Directive).

In any event, the site owner will need to notify or seek the authorisation of CNPD for the transfer of personal data to a third country. However, when such country does not ensure adequate level of protection, the site owner will need to request authorisation to CNPD. In any case, the site owner will need to obtain the previous consent from the site user, which consent can be granted by electronic means, provided it is clear, specific and unambiguous.

The consumer must give his/her consent to the use of such data and the site owner will need to obtain a previous authorisation from CNPD for the use of data for other purposes than its original purpose. In any event, such purposes should be explicit, specified and legitimate. The site owner will only be obliged to inform the consumers of its purposes in the collecting of the personal data.

Transmission of the data to third parties is also allowed provided that:

- the consumer has given his/her consent to the transfer of data to third parties;
- the site owner informs the consumer of its intention to transfer the data to third parties; and

- the site owner gives the consumer the right and the means, free of any charge, to refuse the use of such data by third parties (Articles 10/1(b), 11/1(a) and 12 of the Data Protection Law).

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Macedo Vitorino e Associados - Sociedade de Advogados
Av. João Crisóstomo, 18, 3º Esq., 1000-179 Lisboa - Portugal
Telephone: (351) 21.319 0800 - Facsimile: (351) 21.354 0778

Email: mva@macedovitorino.com

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