ARE YOU READY FOR CONSUMERS 4.0?

E-commerce topics

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Foreword

In a near future, most competitive e-businesses will be able to gauge consumers' needs and understanding what they want even before consumers do. Anticipating consumers' behavior is crucial for the e-business success.

In recent years, consumer behaviors have been modifying in the ever-changing landscape of the digital world.

More and more businesses are investing in e-commerce (and "mobile commerce" – "m-commerce" – due to an increasing use of smartphones), along with big data analytics and artificial intelligence (AI), to boost their industries.

In a report from Accenture on the future of AI, Accenture foresees that AI could boost profitability rates by 38% in the wholesale and retail industries by 2035.

The first generation of e-consumers – «consumers 1.0» – was practically eradicated by «consumers 2.0», who wanted more than simply being able to place online orders; they intended to view their preferences, orders history, invoices, etc..

«Consumers 2.0» currently face a third successor – «consumers 3.0» –, even more sophisticated and pointing toward greater online customization experiences. To satisfy these new needs, e-commerce strategies are changing.

E-businesses will be able, by using big data analytics and AI systems, to build personalization strategies, recommend new products as per consumers' demands, make online payments easier and more secure, identify potential issues and solve them before consumers even get involved.

According to another report published by Boston Consulting Group, the retailers that have carried out personalization strategies based on data analytics and AI tools have achieved a sales gain of nearly 6-10%, a rate two to three times faster than other retailers.

It is hence a question of time until «consumers 3.0» be replaced by «consumers 4.0», who will expect top-notch customer service, and the ability to buy what they want, anywhere, and anytime, offline and online.

For e-businesses to adopt the best approach and make sure that everything is in order to face «e-consumers 4.0», this paper provides some tips that you should be aware on e-commerce, including, but not limited to, the use of big data and AI.

EU e-commerce figures

In a nutshell, e-commerce is the process of buying and selling goods or services by electronic means, such as mobile applications and the Internet. E-commerce refers to both online retail as well as electronic transactions.

Nowadays, e-commerce can be carried out via own websites or apps or via e-commerce marketplaces available on external websites or apps. Examples of marketplaces are: eBay, Amazon, Etsy and Alibaba.

Over the last few years, the share of persons ordering goods or services online increased steadily. Based on the results of the 2018 survey on "ICT usage and e-commerce in enterprises", in the EU-28, the percentage of businesses that had e-sales increased by 7% and the businesses' turnover realized from e-sales increased by 5%, in the period between 2008 and 2017.

The same survey shows that one out of five EU-28 businesses made electronic sales in 2017. The percentage of turnover on e-sales amounted to 17% of the total turnover of businesses with 10 or more persons employed.

That report further states that 87% of EU businesses with web sales used their own websites or apps, while 40% used an e-commerce marketplace.

In 2017, EU-28 businesses gathered 7% of their total turnover from web sales, where 6% was gathered from web sales via own websites or apps and only 1% from sales via online marketplaces.

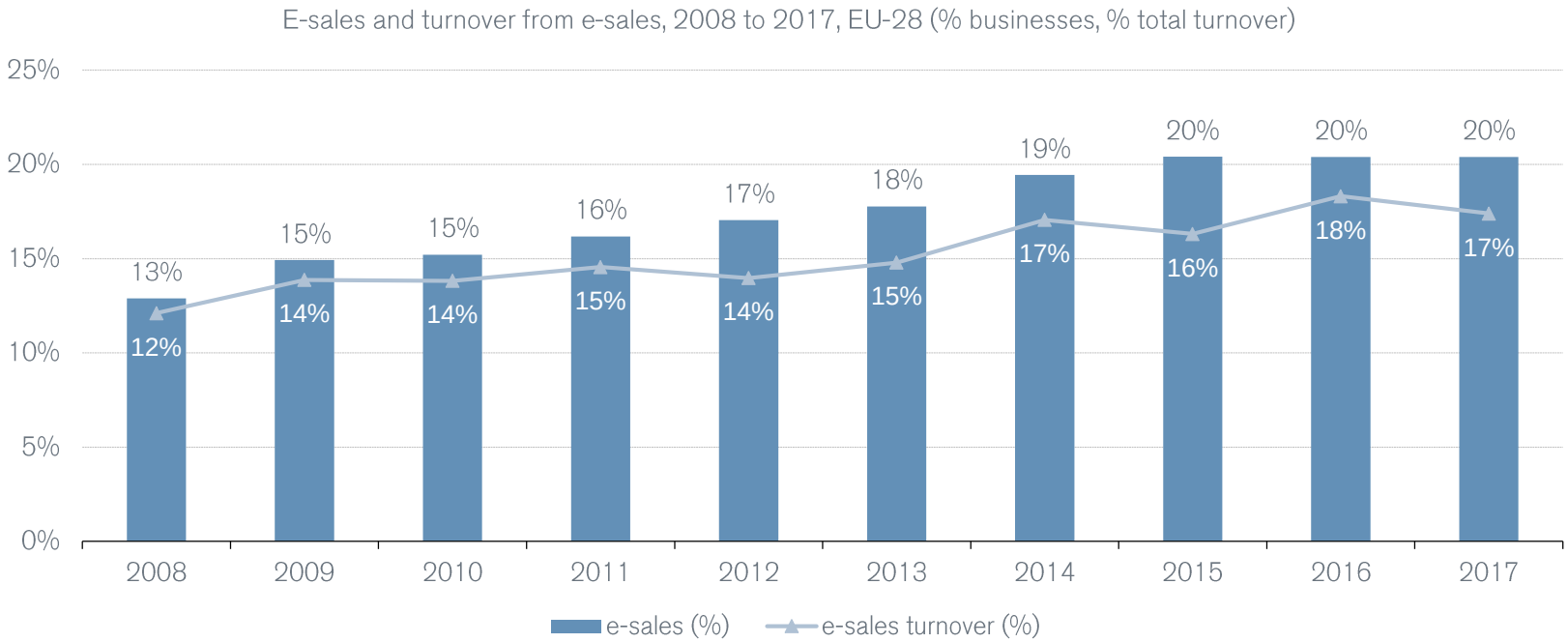
E-commerce obviously reflects Internet penetration and usage. Among Internet users in the EU-28, 69% were e-businesses, meaning they had ordered goods or services online during this period, compared with 50% in 2007.

Looking at the EU-28, more than 8 out of 10 Internet users in the United Kingdom (87%), Denmark (86%), Netherlands (84%), Sweden (84%), Germany (82%) shopped online in 2018.

Around 6 out of 10 e-shoppers in the EU-28 had bought clothes and/or sports goods online in 2018, making this the top category of online purchases.

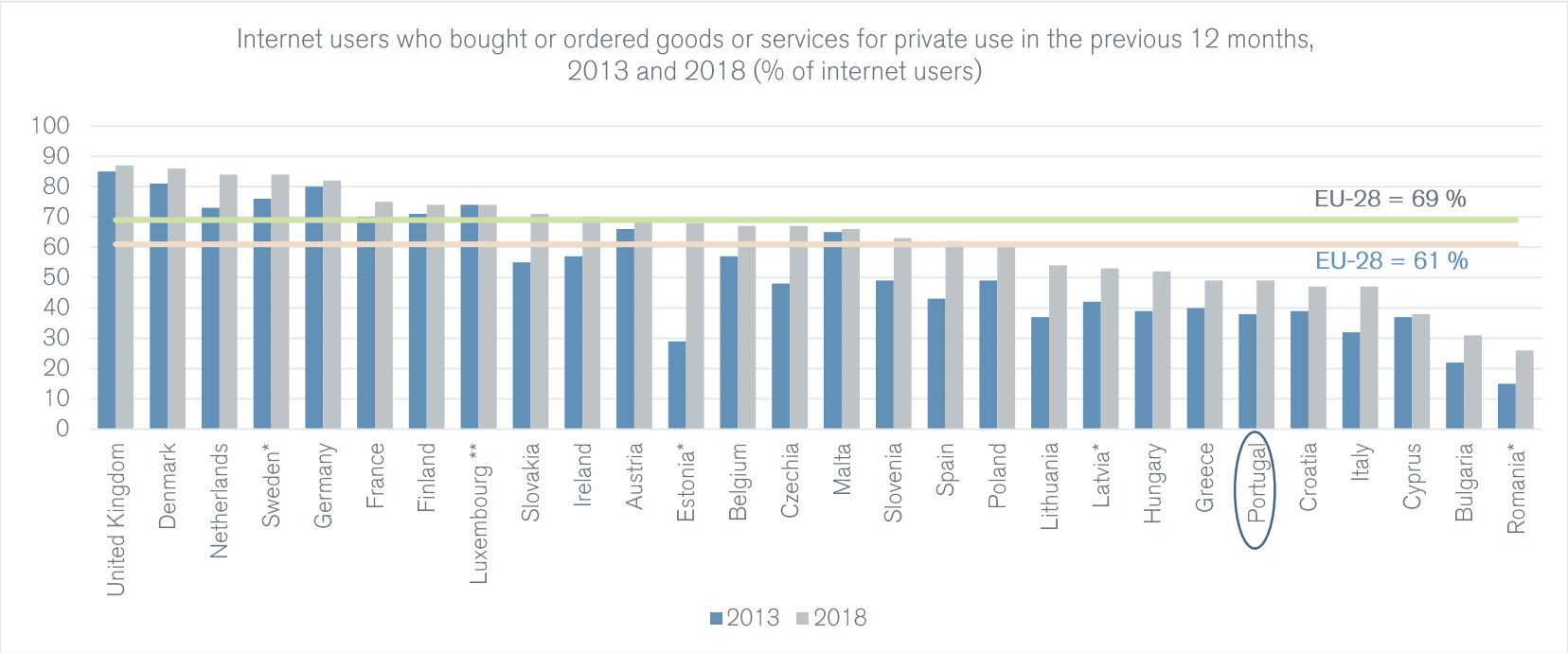
These figures show that EU e-commerce market is becoming one of the most dynamic and fast growing industries., as shown the next couple slides.

E-sales and turnover from e-sales from 2008 to 2017



Source: eurostat

EU Internet users



Source: eurostat

Your website features

A website needs to follow the legislation of the country it is based in, regardless of sales are made to other EU countries, save for consumer law, copyright, electronic money and unsolicited emails.

Before you setting-up an online store, you must confirm whether your website fulfils all the e-commerce requirements. In general, when users access the website:

- Information about your business must be available, including name, address, contact information, registration number, details of any trade association which you are party to, VAT number;
- The website terms and conditions (T&C's), a disclaimer and the privacy policy must be visible and accessible to them;
- Users should clearly receive a message, by way of an interactive banner or a small pop-up, informing them about the use of cookies. A link on the use of cookies (the "cookies policy") must be disclosed at the top or bottom of your website; and
- There must be, at least, one way by which users may contact you.

Your website T&C's are necessary for informing customers that they are entering into a contract by purchasing from your online store, including under which law and jurisdiction your store operates. Despite the choice of the law, you must comply with consumer legislation in each and every European country that you sell to.

As you should need to collect information about your customers, your website has to be secure. It is required a https certificate. You should also remember that to collect customers' data, you need to have a justified ground, e.g. the performance of a contract, your legitimate interests, a legal obligation, customer's consent. You further need to inform customers on their data processing and hence a privacy policy must be available on your online store. Otherwise, you are at risk of facing fines.

Do not forget that your website's users must be also informed on the used cookies. Cookies are small text files that are placed by the website operator on an user's device (e.g. user's laptop or mobile device) when an user accesses the website. In general, cookies are used to remember users' preferences and improve the website's performance.

As your customers may need any support from you, e.g., concerning any features of goods or services, your purchase terms, after-sales assistance, etc., you must make available your contact details –e.g. an email, hotline, chat – on your online store.

Make your website work for consumers

You must comply with consumer legislation in each and every European country that you sell to. If Portuguese consumers are your target, the terms and conditions of the purchase must be available in Portuguese.

For an online sale to be valid and effective, you must provide consumers with:

- A description of the goods, service or digital content;
- The total price, including all applicable fees, taxes (VAT) and surcharges. If this cannot be determined, you must provide the way it will be calculated;
- Payment means;
- Delivery schedules or, at least, an estimated delivery time of goods;
- Legal guarantee of goods and warranties, if any. In Portugal, the legal guarantee is of two years. For second-hand goods, a one-year guarantee may be agreed by the parties;
- The terms and conditions of the purchase and codes of conduct, if any, as well information on how such codes can be accessed electronically.

You need to provide with any technical steps to follow in order to complete the purchase and whether or not the contract will be filled and how to access it, as well as the technical means to identify and correct any errors prior to placing an order.

Following the order, you must send your customers a detailed receipt promptly, either electronically or in paper format. This receipt must be completed with all the details of the order, which items were purchased and the total cost, including all fees, taxes and surcharges.

After the delivery of the goods, consumers have a 14-day “cooling off period” right. Consumers are entitled to cancel online purchased goods and get a refund, including the cost of delivery. You must let know consumers about this withdrawal right, preferably on the purchase’s terms and conditions. A standard cancellation form may be provided to make cancelling easy.

In case of a dispute arising from an online purchase, you must offer consumers an alternative dispute resolution (ADR) to settle a complaint out-of-court. The online dispute resolution (ODR) platform allows consumers to submit a complaint electronically to an ADR body in any language and in any EU country. In general, the process takes place entirely online, lasts around 90 days (after the choice of ADR body), and is free of charge.

Protect your customers' data

The GDPR is directly applicable in EU from 25 May 2018. E-businesses based outside offering goods or services to individuals in the EU are subject to the GDPR. You may risk fines up to €20 million or 4% turnover.

You may collect information about your customers to provide them with your goods, services or digital content. This could be carried out by a newsletter subscription or a contact form. If you give your customers an option to sign up for a newsletter, they must actively check the box. With the GDPR, you may no longer use pre-checked boxes.

Indeed, you should avoid having pre-checked boxes, at all. Otherwise, customers are not saved from accidentally agreeing to spend more than they planned or buy services they do not intend.

One of the best ways to protect yourself is to have a well-designed privacy policy available at a visible link on your website. The privacy policy, among others, must include: what data is collected; why it is collected; how data is stored and kept safe; if the data will be shared; how you can be contacted.

You must also take care about the use of cookies., as they may leave traces which, when combined with unique identifiers and other information, may be used for profiling and identifying your website's users. From an end-user privacy point of view, cookies may be:

- Non-intrusive cookies, e.g. session cookies, users' preferences cookies, or load-balancing cookies do not require prior consent; or
- Privacy-intrusive cookies, e.g. cookies for tracking activity on social networks or third-party cookies (e.g. Google Analytics) when used for behavioral advertising, market research or analysis, require prior consent.

Privacy-intrusive cookies require a «cookie consent rule», as set out in the GDPR. The consent must be a clear affirmative act establishing a freely given, specific, informed and unambiguous indication of the individuals' agreement; silence, pre-ticked boxes or inactivity do not serve as consent.

You must provide customers all the list of privacy-intrusive cookies your website uses and require consent for each type of intrusive cookies. Pre-checked boxes may not be also used. Pre-checked boxes aim to discourage users from selecting the highest privacy levels. Users must be informed on the related risks, including on long-term browsing history records and the use of such records to send targeted advertising.

Avoid spamming

Sending e-mails to customers is a great way to keep them informed about your offers, but be aware of their rights to privacy. Problematic messages may range from unsolicited offers.

You may not send email marketing materials without obtaining prior consent and giving your details to your customers. If you purchased a database of emails, you must ensure that those persons have given their previous consent to transfer their emails on to third parties. Otherwise, you are not entitled to use them.

Moreover, if your e-business sends an email, you must provide instructions to your potential and existing customers on how they can unsubscribe it – the "opt-out" right.

Please be aware that the burden of proof is on your side. You must take evidence that you have consent from individuals to send them marketing emails. This will require you to take a proactive approach in your daily data management. As you must be able to prove that the consent has been given, make sure that you have systems in place to store proof of consent, when needed.

There are several ways to get the required consent. Best practice would be to provide a box (to be checked, but not pre-checked) where the e-mail is being collected and then giving the receiver the right to opt-out future messages. Each message should include: (i) who is sending the promotional message; (ii) your contact details; and (iii) an "opt-out" mechanism.

Under e-privacy rules, which apply along with the GDPR, when an e-mail address is collected during the course of a purchase (or negotiations for a purchase), an "opt-in" is not required if:

- The e-mail address was collected in the regular course of your business;
- Promotional emails relate to similar products and services offered by you; and
- They were clearly and distinctly given the right to object ("opt-out") free of charge and in an easy manner, upon providing the email.

In this situation, your marketing emails may be justified by your legitimate interests. Although in this case a legal assumption exists that the marketing email's receiver is interested in getting information from you, as otherwise he may opt-out, the legitimate interest has to be used carefully. The key is that you ensure that marketing emails are sending to individuals who have an interest in receiving them.

New geo-blocking rules

New geo-blocking rules apply to e-businesses in the EU, regardless of whether they are established in the EU or in a third country. You may no longer deny your customers access to websites from other EU countries.

Geo-blocking refers to actions that were used by e-businesses to restrict online cross-border sales based on the nationality, residence or place of establishment.

New EU geo-blocking rules came effective by 3 December 2018. New rules make sure that customers no longer having to face unjustified barriers, such as being re-routed back to a country-specific website version, or having to pay with a debit or credit card only from a certain country. E-businesses must treat all EU customers equally regardless of where they choose to shop from EU.

For instance, if a Portuguese customer wants to access the Spanish version of your website, if the customer types the Spanish website in the URL, he must have access to the Spanish version and not to be redirected to the Portuguese website version. Being redirected requires customers' explicit consent. Even if the customer gives consent to the redirection, you must ensure that your website's original version remains available.

This does not however mean that you have to accept all forms of payment; you are just not allowed to geo-discriminate within the range of means of payment you accept. This does not also mean that the delivery of a good or service should necessarily take place in another EU country than the one where your e-business is established. New geo-blocking rules do not oblige you to deliver products to other EU country other than the country where you operate.

According to an European Commission report on an e-commerce sector inquiry from 2017, more than one in ten surveyed retailers are contractually obliged to geo-discriminate by manufacturers. You should hence review whether your website and, if you operate in a supply chain, whether your contracts with manufacturers or retailers are compliant with geo-blocking rules. Otherwise, you may face fines for breach of geo-blocking rules and antitrust law just like in the clothing company Guess-case, where the European Commission imposed a €40 million fine in the end of 2018. Guess distribution agreements blocked retailers from advertising and selling cross-border; this prevented EU consumers from shopping in other EU countries and allowed Guess to keep artificially high retail prices in some countries.

Geo-blocking rules apply to e-businesses in general. There are however some exceptions, including transport services, audio-visual services, gambling activities and healthcare services.

Online advertising… hyperlinks, metatags

E-businesses are under similar obligations with respect to advertising materials they provide to consumers in traditional media and on their websites. In any case, advertising must be truthful, honest, fair and accurate.

If you use online advertising materials on your website – this could take place, e.g. for a fixed fee, a fixed period of time, number of times that the ad is displayed, per-click advertising or affiliate marketing –, you must comply with advertising laws.

Advertising law prohibits the use of unfair or deceptive acts or practices in sales means, advertising claims, and marketing and promotional activities, including on websites. Be in mind that:

- Your ads must be clearly identifiable as such;
- The details, on whose behalf ads are made, must be clearly identified;
- Promotional offers, competitions or games must be clearly identifiable and the conditions which are to be met to qualify for them or to participate must be presented clearly and unambiguously.

In a digital context, hyperlinks and metatags are commonly used for online advertising, as follows:

- Hyperlink, or link, is a reference to data that an user can directly follow either by clicking or tapping. A hyperlink points to a whole document or to a specific element within a document;
- Metatags are basically keywords ("tags") that a web designer uses to label groups of information. When an user types a particular keyword on a search engine, this matches the keyword with the metatags of several web-pages and displays the most relevant results.

Before you release third-party contents on your website, you should ensure whether they are protected by copyrights. Copyright infringements may eventually take place where a hyperlink on your website redirects to a copyright-protected content without you have obtaining the relevant holder's consent.

In these cases, even though debatable, there is the risk that you may be liable for encouraging users to access or by facilitating access to copyright-protected content, viz. the holder's right to communicate it to the public. Bearing this in mind, it is in place a copyright reform in EU. A new copyright directive was approved this year 2019.

Big data analytics and AI

In order to boost their industries, e-businesses are employing big data analytics and machine learning (ML) to understand their customers' preferences and gradually align their market offers with customers' needs.

In the past few years, AI has developed algorithms and feed machine learning (ML); this latter one, a subset of AI built from a mathematical model of sample data ("training data"), used to make estimates without being explicitly programmed to perform a task.

The use of big data analytics and AI necessarily involves a commercial relationship by the e-business with a technology partner, one with the industry expertise and the other with the AI knowledge.

This relationship must be governed by an agreement, whereby it establishes each parties' rights.

This task could be challenging as it may require to determine parties' rights over the AI algorithm, the involved data, their enhancements, and the AI algorithm's output. It could be eventually required to determine third-party rights, including confidential obligations.

The use of AI for creating works may also arise relevant copyright issues, but not only.

Creative works, including computer-generated works, may qualify for copyright protection if they are original and, in any way, implies a human intervention. Therefore, we should ask: may a source code used for an AI algorithm or even decisions involved in a creative process, when taken by a ML algorithm without a human hand, be protected by copyright law?

Databases may benefit from a copyright protection, namely original databases, i.e., those that incorporate an intellectual creation in the selection and arrangement of materials; and a "sui generis" right protection for non-original databases where a substantial investment in terms of resources or time spent exists.

As regards industrial property rights, namely patent rights protection over an AI algorithm, this could be tough to the extent that a computer program as such may not be registered as a patent, at least, in the EU.

It is still important to ensure compliance with personal data protection rules.The data must be processed lawfully, fairly and in a transparent manner to ensure data integrity and confidentiality and, at the same time, certify the high-quality of data to be used in the building of AI algorithms.

Looking forward

New EU rules are on the horizon to boost online businesses under conditions of fair competition, removing geo-blocking and addressing consumer, data protection and copyright issues.

E-businesses are one of the pillars of the Digital Single Market (DSM) strategy taken by the European Commission since, at least, mid-2015.

This ongoing package of measures includes, *inter alia*, the revised Payment Services Directive (PSD2) and new rules to stop unjustified geo-blocking, both effective in Portugal from the end of last year.

The PSD2 makes easier to shop online by setting out new rules for sharing information between banks and third-party service providers – FinTech's, technology companies, major online retailers. Upon account-holders' consent, the banks should open up and provide access to their customers' account information to third-party service providers. Third-party service providers will be then able to access the bank's data by using open application programming interfaces (APIs), which will allow data sharing between new payment applications and services and benefit consumers.

Considering digital market developments, revised consumer protection rules – the New Deal for Consumers – are also expected to be approved next year. These new rules will focus on consumers' collective actions, unfair terms in consumer contracts, indication of the prices of goods, unfair "B2C" commercial practices and consumer rights.

As different VAT obligations may arise when an online store sells worldwide, you must be aware that new VAT rules will come into effect in 2021. The so-called MOSS ("Mini One Stop Shop") rule, which now just allows digital services to legally declare VAT in one country only, will be extended to all online sales in 2021. E-businesses will deal with their EU VAT obligations through an online business portal for VAT and in their own language. Online marketplaces may be held responsible for VAT under certain conditions.

In the coming years, the future of the e-commerce seems very much linked to big data analytics and AI, along with new consumer, data protection and copyright issues. To face these next challenges, e-businesses should be well-prepared.

You will need to set up new alliances with tech partners for the use big data and AI tools, which will be crucial for you to know your customers' day to day activity and allow you to satisfy the needs of a new generation of customers that will expect to buy what they want, anywhere, and anytime.

ABOUT US

who we are and what we do

About us

In today's competitive global market, Macedo Vitorino & Associados provides a comprehensive commercial and corporate law advice to domestic and foreign clients. We have strong relationships with many of the leading international firms in Europe, the United States, Brazil and Asia, which enable us to handle effectively cross border transactions.

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We are mentioned by The European Legal 500 in most of its practice areas, including Banking and Finance, Capital Markets, Project Finance, Corporate and M&A, Tax, Telecoms and Litigation.

Our firm is also mentioned by IFLR 1000 in Project Finance, Corporate Finance and Mergers and Acquisitions and by Chambers and Partners in Banking and Finance, Corporate and M&A, TMT, Dispute Resolution and Restructuring and Insolvency.

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The multidisciplinary and integrated character of our corporate and commercial group allows us to efficiently solve the legal issues of our clients, in particular:

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- Competition and European law
- Copyright, intellectual property, IT, patents and trade marks
- Corporate and acquisition finance
- Employment
- Foreign investment
- Mergers, acquisitions and privatisations
- Tax

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