

### **Draft Decree-Law approving the legal system on electronic commerce.**

1. This text has the basic intention of transposing Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000.

The Directive on electronic commerce, notwithstanding its name, does not regulate all electronic commerce: it leaves large areas unregulated, either because they form part of the content of other directives or because they are not considered ready for harmonisation. However, it examines matters that go beyond electronic commerce, such as the electronic contract, which is a matter for common law and not only commercial law.

During the work of transposition, it has been chosen to reject the wider solutions for regulating the sector in question which in theory could be deemed more ambitious, while having adopted a text the scope of which is essentially that of the Directive. In the same way, the opportunity has, in addition, been made use of to examine several points that are not regulated under the Portuguese law and that are not considered in the Directive.

The transposition presents difficulties in reconciling neutral categories individual to a directive, which is a combination of different legal systems, with the frameworks in force under Portuguese law. The Portuguese categories have been as far as possible incorporated while remaining faithful to the Directive, to make the regulations introduced understandable for the persons it affects. In this way, the organisation of the Directive has been changed and its concepts have been translated, where possible, into the corresponding frameworks of Portuguese law.

2. The Directive presupposes the provisions already contained in previous directives. The Directive on distance contracts, already transposed into Portuguese law, is particularly important. It seems to clearly and expressly declare the subsidiary character of the respective transposing text.

One of the main aims of the Directive is to guarantee the freedom of establishment and of providing information society services within the Community, albeit with the exceptions it indicates. The adopted text consists of the subordination of service providers to the regulations of the Member State in which they are established. In so

doing, it attempts to clarify, as much as possible, the concepts expressed in a very vague general language such as "information society services".

3. Another major objective of the Directive consists of determining the legal system for the liability of intermediary service providers. But rather, it aims to establish the conditions for non-liability of these providers, regarding any illegal content of the messages they enable to be sent.

It starts with the declaration of no general obligation to monitor of the intermediate service provider of the information that they transmit or store or to which they facilitate access, and the statement of the common obligations of all intermediary service providers.

The text follows the system of liability specific to the activities that the same directive lays down: mere conduit, caching and hosting. The opportunity has been taken now to anticipate the situation of the intermediate service providers associated with content, such as search and hyperlink tools, that is made similar to that of the service providers of hosting.

It also introduces a scheme for provisionally resolving disputes that arise regarding the legality of the content available on-line, in view of the extreme urgency that it can have in a *prima facie* composition. This function is conferred to the monitoring body, without prejudice of the final settlement of the dispute, which can only occur in court.

4. The Directive regulates "commercial communications". It would seem preferable to talk about "on-line advertising communications" provided that it always and only concerns advertising.

Here arises the issue of unsolicited communications which the Directive leaves by and large alone. Account is taken of the circumstances that in the meantime were approved by Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), that await transposition. Article 13, thereof, on unsolicited communications, establishing that communications for direct commercial purposes only requires the prior consent of the recipient. The system that is dedicated to this is

drawn from establishing and facilitating the transition to operating within Portuguese regulations.

5. The electronic contract is a particularly delicate theme in this Directive. It specifically clarifies that it includes all kinds of contracts, whether they are described as commercial or not.

The principle established is the freedom of recourse to electronic means, with the exceptions which it indicates. For this reason, the obstacles to concluding a contract will need to be removed. This is particularly important if there is the requirement for it to be in writing. Considering the formula currently in force (Article 4 of the Transferable Securities Code) which is broad and independent of technical considerations: declarations issued by electronic means satisfy the legal requirements of written form where they offer the same guarantees of reliability, comprehensibility and conservation.

Another very sensitive point is the moment of the conclusion of the contract. The Directive does not examine it, as it does not propose to harmonise civil law. The Member States have taken very different approaches. In particular, the meaning of acknowledgement of receipt of the order is disputed, some have taken it as acceptance and the others have not.

The latter position has been adopted, by a majority, as the acknowledgement of receipt is intended only to ensure effective electronic communication and not to express contractual position. In addition, it is stated that the offer of on-line products or services represents a contractual offer or an invitation to treat, according to whether it contains or does not contain all the necessary elements for the contract to be concluded with acceptance.

It also aims to regulate the contracting sign between computers, thereby making contracting entirely automatic, without human intervention. It establishes that this is regulated through common regulations insofar as these do not in actual fact presuppose this (human) intervention. It in addition clarifies to what extent adaptations are applicable to the provisions in the case of errors.

6. Regarding the provisions in the Directive on out-of-court schemes for dispute settlement, including appropriate electronic means, there is an appropriate form to transpose this element.

The same functions are attributed to public bodies that advise on the provision of monitoring bodies. Where the competence does not cover specific bodies a central monitoring body will operate. The monitoring bodies shall have functions in the field of preliminary proceedings for administrative offences, which they prepare, and the application of respective fines.

The amount of the fines is set within a very broad framework in order to be dissuasive but at the same time able to adapt to a large variety of situations that could occur.

The administrative offences can be associated with additional sanctions; but additional more serious offences need to be confirmed by court judgment, for periods greater than two years.

Provisional measures have thus been planned to be applied by the competent monitoring body, and which it can establish, amend or withdraw at any time.

Consequently:

Under the legislative authority granted by Law , and under the terms of Article 198(1)(a) and (b) of the Constitution, the Government decrees the following.

## CHAPTER I

### Information society service providers

#### Article 1.

#### **Principle of the freedom to exercise an activity**

- 1 - The activity of information society service services shall not depend on prior authorisation.
- 2 - Provisions in the field of telecommunications are excepted, as is the entirety of the authorisation system that is not exclusively aimed at information society services.
- 3 - Information society services means, when the context gives rise to no other meaning, any service provided for remuneration or at least in the field of an economic activity, at a distance, by electronic means and at the individual request of a recipient of services.
- 4 - The provisions in this text do not include the application of current legislation that is compatible, in particular, in compliance with the application of the legal system of

contracts concluded at a distance and without prejudice to the level of protection of consumer interests stemming from other national legislation.

#### Article 2.

##### **Service providers established in Portugal**

- 1 - Service providers established in Portugal are subject to overall regulations in force relating to the on-line activities that they practice, in the same way as information society services provided in another EU Member State.
- 2 - A service provider that exercises an economic activity in Portugal through an effective establishment is deemed to be established in Portugal regardless of the location of their registered office. The mere availability of appropriate technical means for providing the service, does not in itself constitute an effective establishment.
- 3 - Intermediary service providers who wish to permanently exercise the activity in Portugal must be registered beforehand with the respective monitoring body.

#### Article 3.

##### **Free movement of services**

- 1 - For information service providers not established in Portugal but established in another Member State of the European Community the law of the country of the establishment concerning on-line activities shall be applicable concerning the matters regulated by this text.
- 2 - Services provided under the previous paragraph are free to move within the restrictions in accordance with the following articles.
- 3 - Services originating outside the Community shall be subject to the general application of Portuguese law and are also subject to this text for all that has not been justified by particular inter-Community relations.

#### Article 4.

##### **Exclusions**

The following are outside the scope of Articles 2(1) and 3(1):

- a)* intellectual property, including the protection of databases and topographies of semiconductor products;
- b)* the issue of electronic money, exempted under Article 8(1) of Directive 2000/46/EC;
- c)* advertising carried out by an undertaking for collective investment in transferable securities (UCITS), in accordance with Article 44(2) of Directive 85/611/EEC;
- d)* the activity of insurer, concerning compulsory insurance, fraud and conditions authorised by the insurance body and companies in difficulties or in an irregular situation;
- e)* areas regulated by legislation selected by the parties under private autonomy;
- f)* contracts concluded with consumers, in accordance with obligations resulting from them;
- g)* the validity of contracts in relation to the observation of legal requirements of form in contracts related to rights in real estate.
- h)* permission to send unsolicited commercial communications by electronic mail.

#### Article 5.

##### **Derogations**

- 1 - The competent bodies can restrict the movement of information society services from other Member States of the European Community if they harm or seriously threaten to harm:

- a) human dignity or public policy, in particular on the grounds of the prevention of crimes or administrative offences including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality;
  - b) public health;
  - c) public security, in particular in the sphere of national security and defence;
  - d) consumers, including investors.
- 2 - The measures taken must be proportionate to the objectives to be safeguarded.
- 3 - Restrictive measures must be proceeded by:
- a) the request to the Member State of origin of the service to terminate the situation, and the Member State has not done this, or such measures were inadequate;
  - b) the notification of the Commission and of the Member State concerned of the intention to take restrictive measures.
- 4 - The provisions of the previous paragraph shall not prejudice court proceedings, including preliminary proceedings and acts carried out in the framework of a criminal or administrative investigation.
- 5 - Courts or other competent bodies that apply restrictive measures must immediately notify them to the respective monitoring body, so that they are notified to the Commission and to the affected Member States.

#### Article 6.

#### **Implementation in the case of urgency**

- 1 - In the case of urgency, restrictive measures can be taken without prior notifications to the Commission or other Member States as laid down in the previous article.
- 2 - Measures taken in this way must be immediately notified to the Commission and to the affected Member States, indicating the reasons for which the Member State considers that there is urgency for their adoption.

#### Article 7.

##### **Permanent availability of information identifying the service provider**

- 1 - It is the responsibility of the service providers to make permanently available on-line, conditions which enable the easy and direct access to full identification details including, in particular:
  - a) name or corporate name;
  - b) geographical address where the establishment is located and electronic address, in order to allow direct communication;
  - c) registration of service provider in the public registers and respective register numbers;
  - d) fiscal identification number.
- 2 - If the service provider exercises an activity subject to a prior authorisation system, they must make available the information relating to their respective monitoring body.
- 3 - If the service provider exercises a regulated profession they must indicate their professional title and the Member State in which it was granted, the professional body with which they are registered as well as refer to the professional regulations that govern access to and practising of this profession.

#### Article 8.

##### **Cost information**

If the services provided involve costs for their recipients, in addition to the costs of telecommunication services, including the tax burden or delivery charges, these must be the object of clear information before the use of the services.



## CHAPTER II

### **Liability of on-line service providers**

Article 9.

#### **Principle of equivalency**

On-line service providers' liability is subject to the common principles, in particular in the case of association of contents, with specifications in accordance with the following articles.

Article 10.

#### **No general obligation to monitor for intermediary service providers**

- 1 - On-line intermediary service providers are not subject to a general obligation to monitor the information that they transmit or store, nor to investigate any illegal activities in this field.
- 2 - On-line intermediary service providers are providers that supply technical services for the availability and use of information or on-line services, that do not themselves create the information or the service.

Article 11.

#### **Common obligations of intermediary service providers**

Intermediary service providers are obliged to:

- a)* immediately inform the competent bodies when they have knowledge of illegal activities occurring via the services that they are providing;
- b)* comply with requests from these bodies to identify the recipients of the services that have agreements on transmission or storage;
- c)* promptly comply with the decisions of the competent bodies intended to prevent or terminate an infringement, in particular within the meaning of removing or disabling access to information;

- d) supply monitoring bodies or other competent bodies with lists of site addresses that they host, upon request.

#### Article 12.

##### **Mere conduct**

- 1 - Intermediate service providers whose activity is limited to the transmission of on-line information, or to facilitate access to a communications networks, without having any control over the content of the messages transmitted or the selection of the latter or of their recipients, shall be exempt from any liability for the possible illegal content of the messages.
- 2 - The non-liability is maintained even though the provider carries out purely technical storage of information in the course of transmission process, exclusively for transmission reasons and during the time necessary for this.

#### Article 13.

##### **Caching**

- 1 - Intermediary providers of on-line communications transmissions services who have no control over the content of the messages transmitted or the selection of the latter or their recipients and respect the access conditions to the information, shall be exempted from all liability for any illegal content, even if they temporarily and automatically store the information for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request.
- 2 - However, the common liability system shall be applied if the provider does not operate in accordance with the usual rules of the sector:
  - a) in updating information;
  - b) in the use of technology, used to obtain data on the use of the information.
- 3 - Common regulations are also applicable if it comes to the notice of the provider that the information was withdrawn from the original source or access becomes impossible, or even if a court or administrative body originally ordered its removal

or the disabling of access to it with immediate effect, and the provider has not immediately removed or disabled access.

#### Article 14.

##### **Hosting**

- 1 - The intermediary provider of storing on a server service is only responsible, under common terms, for the illegal content for information that they store if they become aware of an activity or information whose illegality is revealed and do not withdraw or disable access to this information.
- 2 - Civil liability shall still remain whenever, relating to known circumstances, the service provider should be aware of the illegal character of the information.
- 3 - The common regulations shall apply whenever the recipient of the service is subordinate to the provider or is controlled by them.

#### Article 15.

##### **Liability of intermediary service providers associated with content**

Intermediary service providers associated with content, by means of search tools, hyperlink or analogous processes, that allow access to illegal content shall be subject to the corresponding liability system established in the previous article.

#### Article 16.

##### **Provisional settlement of disputes**

- 1 - In the cases considered in Articles 13 and 15, the intermediary service provider, if the illegality is not revealed, shall not be obliged to remove the disputed content or disable access to the information only because of the fact that a third party is arguing an infringement; but the interested party can appeal to the monitoring body and this shall issue a provisional settlement within 48 hours, which shall be immediately forwarded by electronic means to the parties concerned.
- 2 - Whosoever has legal interests in maintaining of that content on-line can in the same way appeal to the monitoring body against a provider's decision to remove or disable access to said content, to obtain a provisional settlement of the dispute.

- 3 - Independent of the decision, no liability falls to the monitoring body nor to the intermediary service provider for having or not having removed the content or disabled access to it, whether it has been revealed that there is or is not illegality.
- 4 - The procedure relating to the supervisory body will be regulated by a special text, but the supervisory body can at anytime amend the content of the provisional settlement decision issued.
- 5 - A final dispute settlement shall be carried out in accordance with and by common means.

Article 17.

**Relation with the right to information**

- 1 - The association of content shall not be considered irregular solely through their being illegal content on the destination site, even if the provider has knowledge of this fact.
- 2 - Remission is legal if it is carried out with objectivity and impartiality, representing the exercise of the right to information; and is illegal if it represents a way of taking ownership of the illegal content for which remission was made.
- 3 - The assessment shall be carried out according to the circumstances of the case, in particular:
  - a) possible confusion between the content of the site of origin and that of destination;
  - b) automatic or intentional character of the remission;
  - c) area of the destination site where the remission was carried out.

CHAPTER III

**On-line advertising communications**

Article 18.

**Scope**

Messages that are restricted to identifying or authorising access to a commercial operator, or that objectively identify goods, services or the image of the operator, in anthologies or

lists, in particular where there are no financial implications shall not constitute advertising communications.

#### Article 19.

##### **Identification and information**

In advertising communications provided at a distance, by electronic means, the following must be clearly identifiable so that they are easily understood by a common recipient:

- a)* the advertising character, as soon as the message appears in their terminal and in a conspicuous way;
- b)* the advertiser;
- c)* promotional offers, like discounts, prizes or gifts, and competitions or promotional games, and the conditions to which they are submitted.

#### Article 20.

##### **Unsolicited communications**

- 1 - The sending of advertising communications, whose reception is independent of the recipients intervention, or by electronic mail, shall require the prior consent of the recipient.
- 2 - The following cases are exceptions:
  - a)* messages sent by non-profit-making organisations;
  - b)* messages sent to legal entities.
- 3 - In the cases laid down in the previous paragraph the recipients shall have recourse to a system with a negative option, maintained for this purpose by the legal system currently in force.

- 4 - It shall also be permitted to supply a product or service, which complies with the same or with analogous products or services, to send unsolicited advertising to the clients with whom previous transactions have been concluded, if the client has been specifically offered the option of rejection at the time the transaction carried out, and if it does not incur additional expense to the cost of the telecommunications service to the recipient.
- 5 - In the case laid down in the previous paragraph, the client must have access to means that allow them at any time to reject, without obligation and without any justified reason, the sending of this advertising in the future.
- 6 - Each unsolicited communication must indicate, an easy to identify and to use, technical means that allows the recipient of the service to reject future communications.

#### Article 21.

#### **Regulated professions**

- 1 - Distance advertising communications by electronic means in the regulated professions shall only be permitted though the strict compliance with the codes of good practice of each profession, in particular, the independence and honour of the profession, professional secrecy and fairness towards the public and other members of the profession.
- 2 - "Regulated professions" shall be understood within the meaning in accordance with the texts related to the recognition of professional education and training in the Community.

#### CHAPTER IV

#### **Electronic contract**

#### Article 22.

#### **Scope**

The provisions of this chapter shall apply to all kinds of contract concluded through electronic or informatic means, whether they are described as commercial or not, in accordance with the following articles.

Article 23.

**Freedom to contract**

- 1 - There shall be freedom to conclude contracts by electronic means unless the validity or effectiveness of these is detrimental to the use of this method.
- 2 - The following legal transactions will be excluded from the point of view of acceptability :
  - a) transactions covered by family law or by the law of succession;
  - b) transactions that require the involvement of the courts, public bodies or other bodies that exercise public authority, in particular when that involvement has repercussions for third parties and therefore transactions legally subject to notorial recognition or authentication;
  - c) in real estate, except for rental;
  - d) transactions of suretyship granted and on collateral securities furnished by persons acting for purposes outside their profession.
- 3 - Acceptance of the electronic conclusion of a contract can only occur between persons who are linked to process this form of contract.
- 4 - General contractual clauses that oblige the electronic conclusion of contracts by consumers are prohibited.

Article 24.

**Form**

- 1 - The declarations issued by electronic means that satisfy the legal requirements of written form when contained in media that offers the same guarantees of reliability, comprehensibility and conservation.
- 2 - Electronic documents are valid as a signed document when they satisfy the requirements of legislation on electronic signatures and certification.

Article 25.

**Identification and error correction systems**

On-line service providers who conclude contracts by electronic means except when otherwise agreed by parties who are not consumers, must make available to the recipient of the service effective means allowing them to identify and correct input errors, prior to the placing of the order.

Article 26.

**Prior information**

1 - The on-line service provider who concludes contracts on-line must make available to the recipients, prior to being given the order, unambiguous information that includes:

- a) the process of concluding the contract;
- b) the archiving or non-archiving of the contract by the service provider and the access to this by the recipient;
- c) >>the language(s) offered for the conclusion of the contract
- d) the technical means that the service provider has available for identifying and correcting input errors that may be contained in the order to be placed;
- e) contract terms and general conditions of the contract to be concluded;
- f) codes of conduct to which the service provider subscribes and the form of consulting them by electronic means.

2 - The previous paragraph can be derogated from when otherwise agreed by parties who are not consumers.

Article 27.

**Order and acknowledgement of receipt**

1 - As soon as an order is received by exclusively electronic means the service provider must acknowledge receipt also by electronic means, except when otherwise agreed



by parties who are not consumers.

- 2 - The acknowledgement of receipt of an order shall be exempted in the cases where the product or service has been immediately provided on-line.
- 3 - The acknowledgement of receipt must contain the basic identification of the contract to which it refers.
- 4 - The provider shall satisfy the duty of acknowledging the receipt shall send a communication to the electronic address that was indicated or used by the recipient of the service.
- 5 - The order becomes final with confirmation from the recipient, issued in the sequence of the acknowledgement of receipt to express their acceptance.

#### Article 28.

##### **Presentation of contract terms and general clauses**

- 1 - Contract terms and general clauses, as well as the acknowledgement of receipt, must always be communicated in a manner that permits their recipient to store and reproduce them.
- 2 - The order, the acknowledgement of receipt and the confirmation of the order are deemed to have been received as soon as the recipients are able to access them.

#### Article 29.

##### **Contracts concluded by means of individual communication**

Articles 26 to 28 shall not apply to contracts concluded exclusively by exchange of electronic mail or equivalent individual communication method.

Article 30.

**Contractual offer and invitation to treat**

- 1 - The offer of on-line products or services represents a contractual offer or an invitation to treat, according to whether it contains or does not contain all the necessary elements for the contract to be concluded with the simple acceptance by the recipient, if not it is an invitation to treat.
- 2 - The single acknowledgement of receipt of the order shall not have the meaning of setting the time of the conclusion of the contract.

Article 31.

**Contracting without human intervention**

- 1 - Contracting concluded exclusively by means of computers, without human intervention, is regulated by common principles, except if these presupposes intervention.
- 2 - The following provisions shall apply regarding errors:
  - a) in the expression of will, if there is a programming error;
  - b) in the declaration, if there is an error in the machine operation;
  - c) in transmission, if the message arrives corrupted at its destination.
- 3 - A part shall not be linked whenever it is required to another part where a defect is detected, in particular for the use of systems to detect input errors.

CHAPTER V

**Application and sanctions**

Article 32.

**Settlement of disputes by electronic means**

The on-line operation of forms of out-of-court dispute settlement between providers and recipients of information society services shall be permitted, with observance of the

provisions on the validity and effectiveness of the aforementioned documents.

#### Article 33.

##### **Central monitoring body**

- 1 - A central supervisory body is hereby established with responsibility for the whole of the fields regulated by this text, except for matters in which the law attributes monitoring functions to another body.
- 2 - The functions of the monitoring body shall be exercised by the ICP-Autoridade Nacional de Comunicações (ANACOM-ICP) [Portuguese National Communications authority].

#### Article 34.

##### **Responsibilities and competences**

- 1 - The monitoring bodies shall operate as reference bodies for the contacts that are established in this field with the other Member States and with the European Commission. Service recipients and providers and the general public can address these bodies for information.
- 2 - The central monitoring body shall have competence over all matters that the law attributes to an administrative body without further specification, and in addition to those attributed in this text.
- 3 - The central monitoring body in addition to the general responsibilities that have already been allocated, when not covered by another body shall be responsible for:
  - a) granting authorisations, when necessary;
  - b) giving information on the practices to be followed to comply with the provisions of this text;
  - c) preparing cases for administrative offences and applying the fines laid down;
  - d) determining the suspension of the activity of the service providers for reasons of serious irregularities, and for reasons of urgency;
  - e) adopting the exemption measures laid down in Article 5 and 6;

- f)* publishing on-line codes of conduct that are more pertinent than those already known;
- g)* publishing additional information, in particular court judgments in this field;
- h)* promoting notification to the European Commission relating to adopting restrictions to the free movement of services of provenance of the Community, or of having adopted restrictions due to reasons of urgency.

Article 35.

**Administrative offences**

- 1 - Administrative offences shall be sanctioned with a fine of EUR 2500 to 50 000 for service providers who:
  - a)* do not have available or do not supply information to the recipients in accordance with Article 7 and 8 of this text;
  - b)* send unsolicited advertising communications, when they are prohibited by law;
  - c)* do not make available to the recipients input error identification and correction systems;
  - d)* omit the swift acknowledgement of receipt of the order;
  - e)* do not communicate the contract terms, general terms and acknowledgement of receipt in a way which allows the recipients to store and reproduce them;
  - f)* do not provide information requested by the monitoring body.
- 2 - Administrative offences shall be sanctioned by a fine of EUR 600 to 100 000 for service providers who:
  - a)* disobey the decisions of the monitoring body or other competent body to identify the recipients of services with whom they have transmission and storage agreements;
  - b)* do not comply with the decision of a court or competent body to prevent or terminate an infringement;
  - c)* omit to inform the competent authority of illegal activities of which they have knowledge, pursued through the services that they provide;

- d) do not remove or disable access to information that they store and whose illegality they are aware of;
  - e) do not remove or disable access to information that they store, if they become aware that it is removed from the source or its access has become disabled, or even though a court or administrative authority ordered its removal or disabling of access to it to be executed immediately;
  - f) exercise their activity without authorisation, when this is necessary;
  - g) repeat the infringements laid down in paragraph 1.
- 3 - Service providers who are associated with content shall comply within the conditions of paragraph 2(e) when they do not disable the location or access to the illegal information.
- 4 - Negligence shall be sanctionable but with the limits of the fine applicable for infringements laid down under paragraph 1.
- 5 - Infractions committed by a legal entity shall be increased by one third of the maximum and minimum limits of the fine.

#### Article 36.

#### **Additional sanctions**

- 1 - The application of the fine can have the additional sanction of publishing the final decision and the loss the loss of goods used to carry out the infringements.
- 2 - In relation to the severity of the infringement, the fault of the agent or the repetition of the infringements, the additional sanction of a ban on exercising the activity for a maximum period of six year, and in the case of individual the ban on holding a company position in information society service provider businesses, during the same period, can be applied concurrently with the fines laid down in paragraph 2 of the previous article.
- 3 - When the activity requires authorisation and this is has not been obtained, upon confirmation of the infringement by the competent authority through the application of a fine, there shall be the additional sanction of the immediate closure of the establishment in addition to the ban on the pursuing the activity.

- 4 - The decision to apply additional measures banning the pursuit of the activity, closure of the establishment and, in the case of individuals, the ban on holding a company position in information society service provider businesses for a period greater than two years, shall be mandatorily confirmed by court judgment, without any postponements, started on the initiative of the individual monitoring body.

Article 37.

### **Provisional measures**

- 1 - The monitoring body responsible for the application of the fine can apply the following provisional measures, provided that they are shown to be immediately required:
- a)* the suspension of the activity or the closure of the establishment while the judicial proceeding are taking place and until the final decision;
  - b)* the seizure of goods that were the means whereby the infringement was incurred.
- 2 - These provisional measures can be established, amended or withdrawn at any time, by the individual monitoring body, on its own initiative or as a requirement of the interested parties, and its legitimacy can be contested by the court.

Article 38.

### **Destination of fines**

The sum of the fines recovered shall revert to the State and to the body that applies them in the proportion of 60 % and 40 %, respectively.

## **CHAPTER VI**

### **Final provisions**

Article 39.

### **Scope**

- 1 - The following shall be outside the scope of this text:
- a)* fiscal matters;
  - b)* competition regulation;
  - c)* the legal system on personal data and the protection of privacy;

- d) legal representation;
  - e) games of fortune or chance in which bets are made with money;
  - f) notorial or an equivalent activity, as characterised by a public profession or other acts of public power.
- 2 - Nothing in this text shall affect the provisions intended to promote cultural diversity, protect the Portuguese language or to guarantee pluralism.

#### Article 40.º

#### **Code of conduct**

- 1 - The monitoring bodies shall encourage the creation of codes of conduct for the interested parties and the distribution of these by electronic means.
- 2 - The monitoring bodies and the Public Ministry shall have the legal right to dispute in court the codes of conduct approved in the field included by this text which exceeds the objectives of the body that issued them or which have content counter to general principles or regulations in force.
- 3 - The codes of conduct shall be published on the Internet by the individual monitoring bodies.

#### Article 41.

#### **Transposition**

This text transposes Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000. ("Directive on electronic commerce").

Read and approved in the Council of Ministers on

The Prime Minister

The Minister for State and Finances

The Minister for Foreign Trade and the Portuguese Communities

The Minister for Justice

The Deputy Prime Minister

The Minister for the Economy,

The Minister for Science and Higher Education,

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