

COVID-19: eCommerce compliance for your business

While electronic commerce has always been important, due to the COVID-19 pandemic, it has now become essential.

For this reason, on March 26, 2020, S+S presented the webinar "COVID-19: eCommerce Compliance for your business", in an effort to ensure that our customers' e-commerce operations have the necessary legal security, including drafting contracts that meet the relevant requirements and obtaining consent in every case, while addressing the various tax and data protection aspects.

From a personal data protection point of view, e-commerce operations involve a large amount of personal data. It is important to understand what data is being processed, what it is being processed for, who is processing it and if the requirements are always being met to ensure that the processing is lawful.

Turning an operation over to the Internet, one must be aware of the risks in terms of cybersecurity and hacking. Also, attention must be paid to the labor and ordinary aspects of manufacturing, logistics and distribution.

In the coming weeks, the e-commerce industry in Mexico, and worldwide, must prepare to meet the needs of its clients. For this reason, the following legal elements, which were addressed by our group of expert lawyers during the webinar, and which we summarize below, must be considered:

CONTRACTUAL TERMS

Electronic commerce, defined as goods or services traded through electronic, optical or any other technology, requires a contract, generally known as "Terms and Conditions". This is regulated by two federal laws: The Commerce Code and the Federal Consumer Protection Law.

The Commerce Code sets forth that any information generated, sent, received or stored by electronic, optical or any other technology (such as the Terms and Conditions for the provision of goods or services) is considered a "Data Message".

Furthermore, it provides that when the law requires for contracts to be formalized in writing, the Data Message, regardless of the format in which it is found or represented, will comply with this assumption, as long as the information contained therein is maintained in its entirety and is accessible for subsequent consultation.

The Code also sets forth that when the law requires the signature of the parties, such requirement shall be deemed met by a Data Message, only if it is attributable to such parties. This leads us to the concept of electronic signature, to which we refer to below.

The requirements to attribute the issuance of a Data Message to a specific person, and the way in which data messages are kept in order for them to be valid, are also regulated by this Code.

On the other hand, the Federal Consumer Protection Law sets forth that transactions carried out between suppliers of goods or services and their consumers through Internet pages, applications, electronic platforms or analogous means, are considered "transactions carried out through the use of electronic, optical or any other technology". In entering into such transactions, suppliers must comply with certain guidelines.

Additionally, this law indicates that any supplier that offers, markets or sells goods, products or services using electronic, optical or any other technology, shall be guided by the provisions contained in the respective Mexican Standard, which currently is the Mexican Standard NMX-COE-001-SCFI-2018.

In regard to contractual terms, in Mexico there are various laws that recognize the validity and compliance elements of contracts entered into by electronic means, which include rules and requirements regarding the use of electronic signatures. These laws are the Federal Civil Code, the Commerce Code, the Advanced Electronic Signature Law and its Regulations, of which we could provide adequate and timely guidance.

TAX ASPECTS

Mexico approved a tax reform that attempts to regulate the use of technological platforms. This reform came into effect on January 1 of this year, but most of the tax obligations will come into effect on June 1, 2020.

The new taxation of technology platforms is divided into two categories, both with different tax obligations:

a) Intermediation platforms

They are called intermediaries because they are a link between the end customer and the vendor or service provider. The following activities can be found under this heading:

- 1.- Passenger transport
- 2.- Accommodation
- 3.- Disposal of goods and services

b) Digital streaming platforms

In digital streaming platforms there is no intermediary component, so the revenue is obtained directly from the platform. The services taxed as such are the following:

1.- Downloading of images, films, text, information, video, audio, music, games, including gambling, among others. It does not include access to books, newspapers and electronic magazines.

2.- Online clubs and dating sites.

3.- Distance learning.

Both platforms have different tax obligations, which require special attention and advice.

PERSONAL DATA PROTECTION

The right to the protection of personal data is an individual guarantee that allows us to decide on the processing, by any third party, whether a private or public entity, of information that is ours, and identifies us or makes us identifiable.

It is important to emphasize the two most visible obligations with which all individuals must comply: the preparation and provision of a privacy notice (comprehensive, short, or simplified) and consent (tacit, express, or explicit and in writing).

Each of these notices has requirements and particularities that are set forth in the applicable data protection law, its Regulations, or the Privacy Notice Guidelines.

CYBERSECURITY AND HACKING

Cybersecurity consists of techniques that ensure that information exchanged through cyberspace is kept confidential, complete and available, as well as to guarantee its authenticity, reliability, traceability and non-repudiation, which is essential to fulfil the obligations and secure the rights of the parties who carry out an online transaction.

Disregarding cybersecurity can affect a business in a number of ways, either by de-configuring the site through denial of service attacks or altering the content of the site, violating customer or user information, and even making the site a vector for infection of users' devices, just as is happening with the spread of COVID-19.

For this topic, it is important to know the criteria of the Regulations to the Federal Law on Protection of Personal Data in regard to security breaches and ensure compliance with them to reinforce their confidentiality and integrity.

HEALTH CONTINGENCY FROM THE LABOR POINT OF VIEW

On March 24, 2020, the Resolution issued by the Ministry of Health regarding preventive measures to be implemented to mitigate and control the health risks posed by the COVID-19 virus was published in the Federal Official Gazette. This Resolution suspends activities that involve the displacement, transit or concentration of people until April 19, 2020 (further extended generally to June 1). However, it did not declare a health contingency and therefore labor relations were not suspended.

For this reason, remote work should be favored, particularly taking into account that the Resolution specifically protects employees of vulnerable groups, including: adults over 65 years of age, minors, pregnant or nursing women, and people with chronic non-

transmissible diseases or conditions or treatments that suppress their immune system. All of them must abstain from reporting to work, under the modality of paid leave.

The Resolution further establishes that companies, businesses, commercial establishments and all those that may be necessary to deal with the contingency must continue their activities, such as hospitals, clinics, pharmacies, laboratories, medical services, financial services, telecommunications and information media, hotel services, restaurants, gas stations, markets, supermarkets, miscellaneous, transport services, and gas distribution, as long as they do not correspond to closed spaces with agglomerations.

Among these, the logistics and parcel services necessary for the delivery of products derived from electronic commerce, stand out. These services must follow the aspects of regulation, quality, distribution and transportation.

REGULATION OF PRODUCT MANUFACTURING, LOGISTICS, AND DISTRIBUTION

As of today, there is no specific regulation, either rules or a Mexican Official Standard, that regulates the manufacture, quality and distribution or transportation of goods and/or services specifically traded through e-commerce. Therefore, the laws that regulate traditional commerce in general, whether supplementary or complementary, also regulate e-commerce.

The products must comply with the guidelines and requirements set forth in the Code of Commerce, the Federal Consumer Protection Law, the General Health Law and its Regulations, the Federal Law of Metrology and Standardization, the Mexican Official Standards (NOM), and the Mexican Standards (NMX).

It is important to mention that up to this moment, during the contingency we are living, the federal government has not issued specific requirements or preventive measures of supervision and control beyond the provisions already existing, regarding sterilization, handling or treatment and delivery of goods and services that are distributed through electronic or traditional commerce.

In case you require additional information, please contact the partner responsible of your account or any of the following attorneys:

Mexico Office: Mr. Jorge León Orantes B., jleon@s-s.mx (Partner)
Mr. Alejandro Luna A., aluna@s-s.mx (Partner)
Phone: (+52 55) 5279-5400

Monterrey Office: Mr. César Cruz A., ccruz@s-s.mx (Partner)
Phone: (+52 81) 8133-6000

Queretaro Office: Mr. José Ramón Ayala A., jayala@s-s.mx (Partner)
Phone: (+52 442) 290-0290