

Articles 15 & 17 of the Directive on  
Copyright in the Digital Single Market  
Questionnaire – Annex to the Comparative  
National Implementation Report

**PORTUGAL**

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This comparative report is based on 25 national questionnaires prepared by national legal experts.

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**The full study is available for download at: <https://informationlabs.org/copyright>**

## Country: PORTUGAL

National Expert: DR TITO RENDAS (Católica Global School of Law)

Last updated: 11 August 2023

### PART I: Article 15 CDSMD

**Note: The questions below concern the national implementation of Article 15 CDSMD in your country. They refer to this as the “local national implementation” or LNI. It is recommended that you read all the questions before beginning to compose answers. In all responses, please cite the relevant provisions of national law in your country.**

#### Background information

- 1. Did your national jurisdiction provide protection (whether via copyright or a relevant targeted related right) for press publications prior to the adoption of the CDSMD? If so, please briefly describe this, indicating any differences from the protection provided by Article 15 CDSMD.**

Portuguese law protected press publications – both press publications as collective works and the individual pieces included therein – before the adoption of the Directive.

Under Article 19 of the Portuguese Copyright and Related Rights Code (the “*Código do Direito de Autor e dos Direitos Conexos*”, hereinafter CDADC), newspapers and other periodical publications are protected as collective works (*obras coletivas*), with the exclusive rights belonging to the person – namely, the company – which organizes and coordinates the publication and under whose name it is published.

On the other hand, Article 173 CDADC provides that the copyright over a work published *in* a newspaper or periodical publication, even if unsigned, belongs to the author and only he or she may make or authorise the reproduction of that work separately or in a similar publication, unless otherwise agreed in writing. Nonetheless, the owner or publisher of the press publication may reproduce the issues in which that work was published.

Furthermore, Article 174 CDADC contains specific rules for journalistic works produced under an employment contract. The copyright over those works belongs to the author, provided authorship is identified by signature or otherwise. Unless authorised by the company that owns the press publication, the author may not publish the work separately before three months have elapsed from the date on which the publication was put into circulation. In contrast, if the works are not signed or do not otherwise identify the author, the copyright over them belongs to the company, and only with its authorisation may they be published separately by their authors.

These pre-existing provisions are unaffected by the new press publishers’ right. As per the LNI, which closely follows the wording of recital 59 *in fine*, the new right is without prejudice to extant provisions relating to the ownership of rights in press publications and works included therein or the exercise of rights under employment contracts.

**2. Has Article 15 CDSMD been transposed into national law in your country? If so, please cite the legal act with which and the date on which this was done. Please also briefly indicate whether you consider that the transposition takes a textual (“*ad litteram*”) or intentionalist approach (e.g., one that is adaptive to national circumstances).**

Article 15 was transposed into Portuguese law with a significant delay. A first transposition proposal (Proposal 114/XIV) had been tabled in 2021, but it ended up expiring due to the dissolution of the Portuguese Parliament as a result of a political crisis. After the elections that led to the formation of a new government, a second proposal (Proposal 52/XV) was presented, making its way through the legislative process with no major difficulties. The Portuguese LNI – Decree-Law 47/2023, which essentially corresponds to the text of Proposal 52/XV – was ultimately published in the Portuguese Official Journal on 19 June 2023.

For the purposes of this section of the report, three provisions of the LNI deserve particular attention: Article 3, which amended, among others, certain provisions in the existing related rights section of the CDADC; Article 5, which added two new provisions focused specifically on the press publishers’ right; and Article 12, which enacts a transitional extended collective licensing scheme for certain types of press publications.

The gist of the new right is regulated in the two provisions that were added by Article 5 – the new Articles 188-A and 188-B CDADC. Each provision follows a distinct approach, however: whereas Article 188-A is essentially (though not exclusively) a reproduction of the different paragraphs in Article 15 CDSMD, Article 188-B takes a more creative approach, namely by specifying criteria to determine the remuneration to be paid by ISSPs and by imposing informational duties upon them.

CDADC	CDSM Directive
Art. 176(11)	Art. 2(4); recital 55
Art. 188-A(1)	Art. 15(1)(i)
Art. 188-A(2)	Art. 15(1)(ii)-(iv)
Art. 188-A(3) and (4)	Art. 15(2)(i)
Art. 188-A(5) and (7)	Art. 15(2)(ii)
Art. 188-A(6)	Clarification included in recital 59: the contractual arrangements concluded between press publishers, on the one hand, and authors and other rightholders, on the other, are not affected
Art. 188-A(8)	[specific ADR mechanism for disputes between press publishers, ISSPs and authors]
Art. 188-B	[defines criteria for determining the competition, informational duties, and revenue sharing]
Art. 189	[lays down the exceptions to related rights in general, one of which now being the press publishers’ right]

**If available, please provide a link to the legal provision in the official language(s) of your jurisdiction. If you are aware of a good (official or unofficial) English language translation, please include that as well.**

<https://diariodarepublica.pt/dr/detalhe/decreto-lei/47-2023-214524782>

Please bear in mind that Decree-Law 47/2023 is a transposition instrument. This means that its provisions essentially *amend* existing provisions (e.g., provisions of the CDADC, the Collective Management Law, the Databases Law) or *add* new ones to existing laws (e.g., Articles 188-A and 188-B, which were added to the CDADC by Article 5 Decree-Law 47/2023).

### **AC 1: Subject matter**

- 3. What is the subject matter (object) of protection by the LNI and how is this defined? Please focus on any differences (including additions) from the concept of “press publications” as defined by Art. 2(4) CDSMD.**

A new paragraph 11(a) was added to Article 176 CDADC, which transposes the definition in Article 2(4) CDSMD in a literal manner.

- 4. Does the LNI protect against uses of individual words or very short extracts? If these are excluded from protection, how are they defined? Please note whether a qualitative or quantitative approach is taken and whether such short extracts may include non-literary content. Please note whether there are specific provisions on headlines.**

Article 188-A(2)(c) CDADC reproduces Article 15(1)(iv) CDSMD in a textual manner, with a carve-out for individual words and very short extracts. However, unlike in other Member States, no definition of these concepts is provided, nor is there any specific reference to headlines.

- 5. Does the LNI extend to mere facts reported in its subject matter? If these are excluded from protection, how are they defined?**

The national transposition is silent regarding mere facts.

- 6. Does the LNI extend to public domain content incorporated in its subject matter? If these are excluded from protection, how are they defined?**

Article 188-A(7) CDADC reproduces Article 15(2) CDSMD *in fine*: the new press publishers’ rights shall not be invoked to prohibit the use of works or other subject matter for which protection has expired.

- 7. Does the LNI include any other threshold conditions for protection?**

No. The LNI does not elaborate on the conditions provided in Article 15 CDSMD, nor does it add any new ones.

## **AC 2: Right-holders**

- 8. Who are the beneficiaries of the protection for press publications in the LNI? Please indicate any exclusions, (e.g., territorial). Please indicate if the LNI employs lists of press publications or beneficiaries that would be covered.**

The beneficiaries are the press publishers established in a Member State of the EU. The new paragraph 11(b) of Article 176 CDADC defines “press publisher” as “the legal or natural person under whose initiative and responsibility the press publication is published, including, *inter alia*, media companies and service providers such as news publishers and news agencies, when they publish press publications within the meaning of the previous paragraph”.

## **AC 3: Restricted acts**

- 9. Against what kind of acts does the LNI protect? Please provide any relevant definitions.**

Against acts of online reproduction, communication to the public and making available to the public of press publications, in whole or in part. In Portuguese law, the definitions of reproduction and communication to the public are literal transpositions of the notions found in the InfoSoc Directive. Specifically, the making available prong means at a time and place of the user’s choosing.

- 10. Does the LNI cover hyperlinking to the protected subject matter? If not, how is hyperlinking defined?**

Art. 188-A(2) CDADC expressly states that the new rights do *not* apply to the provision of hyperlinks. Yet, it does not define “hyperlinks” or “acts of hyperlinking”.

## **AC 4: Targeted users**

- 11. Does the LNI target use by a specific kind of user (provider)? Please provide any relevant definitions. Specifically, please indicate whether private or non-commercial uses by individual users are covered. Please also indicate whether online platforms (OCSSPs) are covered.**

The LNI only refers to information society service providers (ISSPs), without any further specification. The notion is defined in Article 3(g) by Decree-Law 30/2020, of 29 June, which transposed Directive 2015/1535, as:

“any provision of an activity at a distance, by electronic means and at the individual request of its recipient, usually for remuneration, whereby, for the purposes of this definition: (i) 'at a distance' means a service provided without the parties being simultaneously present; (ii) 'by electronic means' means a service sent from the source and received at the destination by electronic means of processing (including digital compression) and storage of data which is wholly transmitted, conveyed and received by wire, radio, optical means or other electromagnetic means; (iii) 'at the individual request of its recipient' means a service provided by data transmission upon an individual request”.

Private and non-commercial uses by individual users are expressly excluded – *see* Q13 below.

- 12. Does the LNI allow for the rights it provides to be invoked against:**
- a) right owners whose content is incorporated in the protected subject matter?**
  - b) holders of licenses to exercise rights in content that is incorporated in the protected subject matter?**
- Please describe the applicable rules.**

No. Article 15(2) CDSMD is transposed in a literal manner.

## AC 5: Exceptions and limitations

### **13. Does the LNI recognise exceptions or limitations to the protection it provides? If so, please indicate what these are.**

The press publishers' right was included in the section of the CDADC dedicated to related rights. Article 189 CDADC enumerates a few specific exceptions for related rights (e.g., private use, use of excerpts for purposes of information or criticism, and uses for scientific and teaching purposes), but it also adds that *all* the exceptions to the copyright rights apply to related rights too, provided they are compatible with the nature of the latter. The applicability of those exceptions to the press publishers' right is in compliance with Article 15(3) and recital 57 CDSMD.

It is important to note, however, that Article 188-A, in laying down the private use carve-out, is more restrictive than Article 189. The latter simply states that the protection conferred by related rights (in general) does not cover 'uses that are exclusively private and non-commercial'. The former, however, is not only narrower than the exception in Article 189, but also narrower than the original Article 15 carve-out, as it applies to "the private use by individual users, in exercising their right to be informed, through lawful access, and provided they do not make any commercial use, directly or indirectly, of the press publications". Thus, it adds two conditions to the Article 15(1)(ii) formula: besides the uses having to qualify as private and non-commercial, individual users must also (i) be acting in the exercise of their right to be informed and (ii) have lawful access to the press publication.

There is some uncertainty as to how the carve-outs in Article 188-A and Article 189 interact with each other: on the one hand, the one in Article 188-A seems to be *lex specialis* in relation to the general exception laid down in Article 189; on the other hand, Article 188-A expressly states that it is "without prejudice to Article 189".

## AC 6: Licensing

### **14. Does the LNI include provisions on the licensing (incl. systems of extended collective licensing) of uses of press publications? If so, please briefly describe any relevant details. For example, these could involve the following:**

- **criteria for determining the height of compensation;**
- **the process for negotiating compensation;**
- **transparency duties (incl. data sharing obligations);**
- **duties to engage in negotiations;**
- **oversight by a government authority;**
- **(mandatory) collective rights management.**

As mentioned above, Article 188-B went beyond the Directive by establishing rules on licensing and informational duties.

Regarding licensing, Article 188-B starts by stating that where the press publishers' rights are exercised through a CMO, the definition of the remuneration amounts shall be governed by Law no. 26/2015 of 14 April [the Portuguese Law on Collective Management] on the setting of general tariffs. Without prejudice to that, Article 188-B adds that the remuneration shall take into account the economic value of the online use of press publications by ISSPs, including, inter alia, any direct economic benefit obtained by the ISSP from the use of the publications.

Regarding transparency, Article 188-B obliges ISSPs to provide press publishers, or, where applicable, the CMOs that represent them, with relevant and reliable information concerning the uses of their press publications made by users of their services, to the extent reasonable, necessary and proportionate. Nevertheless, ISSPs shall not be obliged to provide information where it is demonstrated that the provision of such information would involve any of the following: (a) the disclosure of trade secrets within the meaning of the Trade Secrets Directive; (b) the unauthorised transmission of content protected by copyright or other exclusive rights; or (c) the unlawful transmission of personal data protected by the GDPR or by any other legal provisions relating to the protection of personal data. Article 188-B further clarifies that the disclosure of commercially sensitive or non-public

information may be subject to the signing of confidentiality agreements or the provision of other confidentiality guarantees.

In addition, the LNI, in its Article 12, establishes a transitional extended collective licensing scheme, which applies to *regional* press publications. National law defines “regional press publications” as all periodical publications which are predominantly directed at the respective regional and local communities, regularly devote more than half of their editorial content to facts or matters of a cultural, social, religious, economic and political nature concerning those communities, and are not dependent, directly or through an intermediary, on any political power, including the local authorities. As per the transitional rule in the LNI, any reproduction, communication to the public or making available to the public, in whole or in part, of online press publications, published under the initiative and responsibility of regional press publishers, shall be subject to Articles 36-A and 36-B of the Portuguese Collective Management Law – these being the provisions that transposed the extended collective licensing scheme established in Article 12 CDSMD. This transitional regime applies until 31 December 2028, from which date the management of the rights at stake will follow the voluntary collective management regime.

### **AC 7: Revenue sharing**

**15. Does the LNI require that any revenue it provides be shared with authors of works incorporated in its subject matter? If so, does it provide details on e.g., the size of the share or modes of collection and distribution or transparency obligations on press publishers? Please describe the applicable rules.**

Article 188-B(6) CDADC transposes Article 15(5) CDSMD in a literal manner. Article 188-B(7) clarifies that the new rules on fair remuneration – which emerged from the transposition of Article 18 of the Directive and which were added to a different section of the CDADC – also apply to these rightholders.

### **AC 8: Term of protection**

**16. What is the term of the protection afforded to press publications by the LNI?**

Two years after the press publication is published, with the term expiring on the first day of the year following that in which the two-year term is reached. The protection does not apply to press publications first published before 6 June 2019, as per the CDSMD (regardless, the right does not apply before the coming into force of the LNI – see Q18 below).

### **AC 9: Waiver**

**17. Can right-holders waive their rights under the LNI? Can authorisation be given for free?**

The LNI is silent regarding these issues. This suggests that the answer to both questions is in the affirmative, namely if one considers the nature of these rights as non-moral rights.

### **AC 10: Entry into effect**

**18. From what date did the protection provided by the LNI come into effect in your jurisdiction?**

The *vacatio legis* period provided in the LNI was 15 days from the date of publication in the Official Journal, meaning that the law came into effect in early July 2023.

The amendment to Article 195 CDADC – which extended criminal liability to the cases of infringement of the press publishers’ right – will only come into force on 1 January 2024.

### **Additional information**

**19. Can you think of any noteworthy divergence in the LNI from the standards set out in Article 15 of the CDSMD that you have not already addressed above? If so, please elaborate.**

Two further aspects should be highlighted, even though they are not exactly divergences from the standards defined in Article 15 CDSMD.

First, it should be noted that the infringement of the press publishers' right gives rise to criminal liability. The provisions laying down the crimes of *usurpação* and *contrafação* (Articles 195 and 196) have been expressly amended in order to cover the infringement of that related right.

Second, 188-A(8) CDADC provides for a specific ADR mechanism for disputes related to the new press publishers' right. Under this provision, disputes between press publishers and ISSPs, as well as disputes between press publishers and authors in what regards revenue sharing, are subject to arbitration when, at the express option of publishers in the first case or authors in the second case, those disputes are submitted to the assessment of a specialised arbitration centre. At the time of writing, however, this centre was still to be established and further regulated by the government.



## PART II: Article 17 CDSMD

**Note:** The questions below concern the national implementation of Article 17 CDSMD in your country. They refer to this as the “local national implementation” or LNI. It is recommended that you read all the questions before beginning to compose answers. In all responses, please cite the relevant provisions of national law in your country.

### **Background information**

- 1. Has Article 17 CDSMD been transposed into national law in your country? If so, please cite the legal act with which and the date on which this was done. Please also briefly indicate whether you consider that the transposition takes a textual (“*ad litteram*”) or intentionalist approach (e.g., one that is adaptive to national circumstances).**

Article 17 has been transposed into Portuguese law with a significant delay. A first transposition proposal (Proposal 114/XIV) had been tabled in 2021, which ended up expiring due to the dissolution of the Portuguese Parliament in the end of the year as a result of a political crisis. After the elections that led to the formation of a new government, a second proposal (Proposal 52/XV) was presented, making its way through the legislative process with no major difficulties. In both proposals, the regime of Article 17 was split into a number of separate provisions to be added to the existing Copyright and Related Rights Code (the “*Código do Direito de Autor e dos Direitos Conexos*”, hereinafter CDADC). This division aside, both transposition proposals followed a largely verbatim approach.

The Portuguese LNI – Decree-Law 47/2023, which essentially corresponds to the text of Proposal 52/XV – was ultimately published in the Portuguese Official Journal on 19 June 2023. Article 5 of Decree-Law 47/2023 added a new section to the CDADC, composed of nine provisions, which mostly reproduce the different paragraphs of Article 17 and some segments of specific recitals of the Directive.

CDADC	CDSM Directive
Art. 175-A ( <i>Definições</i> )	Art. 2(6); recital 62
Art. 175-B ( <i>Utilização de conteúdos protegidos por OCSSPs</i> )	Art. 17(1), (2) and (3)
Art. 175-C ( <i>Atos de comunicação ao público não autorizados</i> )	Art. 17(4) and (5); recital 61
Art. 175-D ( <i>Limitação de obrigações quanto a novos OCSSPs</i> )	Art. 17(6); recital 67
Art. 175-E ( <i>Dever de informação</i> )	Art. 17(8)(ii); Art. 17(9)(iv)
Art. 175-F ( <i>Procedimento de reclamação e reapreciação</i> )	Art. 17(9)(i) and (ii)
Art. 175-G ( <i>Resolução alternativa de litígios</i> )	[specific ADR mechanism under Art. 17(9)(ii)]
Art. 175-H ( <i>Proteção de dados pessoais</i> )	Art. 17(9)(iii)
Art. 175-I ( <i>Disponibilidade de conteúdos</i> )	Art. 17(7)(i)

**If available, please provide a link to the legal provision in the official language(s) of your jurisdiction. If you are aware of a good (official or unofficial) English language translation, please include that as well.**

<https://diariodarepublica.pt/dr/detalhe/decreto-lei/47-2023-214524782>

Please bear in mind that Decree-Law 47/2023 is a transposition instrument. This means that its provisions essentially *amend* existing provisions or *add* new ones to existing laws. For the purposes of this section of the report, the most important provision of the LNI is Article 5, which added Articles 175-A to 175-I to the CDADC.

### **AC 1: Subject matter**

#### **2. What is the subject matter (object) of protection by the LNI?**

The expression used is “works or other subject matter protected by copyright or related rights”. The rights included in the CDADC’s section on related rights are the three classic ones: performers; phonogram and video producers; broadcasting organisations (and now the press publishers too). Scholars pinpoint other rights that are spread across Portuguese copyright law, like the database producers’ right, but these doesn’t seem to be relevant for the purposes of Art. 17.

### **AC 2: Right-holders**

#### **3. Who are the beneficiaries of the protection provided by LNI? Please note whether there are any deviations from the directive.**

Copyright right-holders and related right-holders.

### **AC 3: Exclusive rights**

#### **4. Against what kind of act does the LNI protect right-holders? Is a legal qualification given to those acts (e.g., “communication to the public”)?**

Article 175-B CDADC protects right-holders against the act of giving the public access to subject matter protected by copyright or related rights that is uploaded onto online content-sharing services by their users. These acts are qualified as acts of communication to the public or making available to the public.

### **AC 4: Targeted providers**

#### **5. Does the LNI target a specific kind of service provider? Please provide any relevant definitions, including any exclusions (“carve-outs”). Please focus on any differences from the concept of “online content sharing providers” (OCSSPs) as defined by Article 2(6) CDSMD and any elements taken from the recitals (e.g., facilitating piracy, definitions of “large amounts”).**

The concept used in Portuguese law is a verbatim transposition of Article 2(6) CDSMD. Similarly, the list of exclusions provided in Art. 175-A(2) CDADC reproduces that of the CDSMD, though with a relevant difference: while in the Directive the list is non-exhaustive, in the CDADC the list is a closed one.

**6. Were the targeted service providers considered to infringe the relevant exclusive rights in your country prior to the adoption of the LNI? Please indicate whether any liability was primary or secondary.**

Under Portuguese law, and prior to the CDSMD, intermediary liability essentially derived from the failure to comply with a duty to act (liability for omissions). Such duties arise from the liability framework outlined in the national instrument that transposed the E-Commerce Directive – Decree-Law 7/2004, of January 7 (which was later amended in 2009, 2012 and 2020).

Article 11 of Decree-Law 7/2004 provides that the liability of online intermediaries is to be determined under the general rules, notwithstanding the specifications introduced by the safe harbours. This provision thus establishes the fundamental principle of intermediary liability in Portugal: intermediaries are subject to the general liability standards, without prejudice to the cases where one of the safe harbours may apply.

The answer outlines the issue from the perspective of both civil liability and criminal liability.

*Civil liability*

Under the general regime of civil liability, the conduct of the intermediary must fulfil five conditions in order for the intermediary to be found liable: (i) a voluntary action or omission; (ii) the unlawfulness of that action or omission; (iii) existence of fault; (iv) existence of damages; and (v) a causal nexus between the action/omission and the damages.

As is clear from condition (i), liability can be established either by demonstrating a concrete harmful action (liability for action) or by showing that the damage was caused by the lack of an action that should have been undertaken by that person (liability for omission). Not all omissions can constitute grounds for liability, however. According to Article 486 of the Portuguese Civil Code, omissions will only give rise to liability if there was a duty to act, by virtue of law or contract. Taking into account that intermediaries are under no general duty to monitor their services (Article 12, which transposed Article 15 of the E-Commerce Directive), the question is whether hosting providers are, and in what circumstances, under a legal duty to act.

The safe harbour for hosting providers (Article 16) states that these providers shall only be held liable for the information they store if they have knowledge of an activity or information whose unlawfulness is manifest and do not immediately remove or disable access to that information (paragraph 1). It is further stated that a hosting provider shall incur in civil liability whenever, considering the circumstances of which it has knowledge, the provider is or should be aware of the unlawful character of the information (paragraph 2). Note that hosting providers will not benefit from the exemption where the user that has uploaded the infringing content acted under the direction or control of the provider (paragraph 3), for in that case the latter will not have acted as a neutral *intermediary*.

Hosting providers may therefore be found liable for failure to comply with a duty to act under Article 16. Thus, these providers will be held liable only if, having received due notice that they are storing *manifestly* unlawful content, they fail to expeditiously remove or disable the access to such content. If a hosting provider is notified of content that it stores and that is evidently unlawful, it will be under a legal duty to act and to expeditiously remove that content. Otherwise, its omission will constitute grounds for liability. The safe harbour provided in Article 16 of Decree-Law 7/2004 is therefore a true rule of conduct, which imposes legal duties to act.

In these cases, if the plaintiff proves the breach of a legal duty to act, he or she will only need to establish the existence of damages and the causal nexus between the unlawful omission and such damages, since proving a relevant omission is the same as proving the remaining three requirements for civil liability: an omission *per se*, its unlawfulness, and the intermediaries' fault.

In most instances where an intermediary is found liable for omission, it will also be established that it committed negligent conduct – as opposed to wilful conduct –, given that omission will most certainly be grounded in a lack of due care or an unacceptable delay upon receiving notification of the unlawful content. Such absence of conduct will typically not be done with a specific intent towards non-compliance. This means that providers who lack a direct intent to breach the law, but that nonetheless act negligently, can face liability for providing access to protected content uploaded by their users.

### *Criminal liability*

As to criminal liability, one particular case – an unprecedented one in Portugal, as far as I know – should be mentioned. In the *BTuga* case,<sup>1</sup> the founder and manager of a widely used file-sharing website that offered illegal content was found to be a direct infringer under criminal copyright law. The founder of the website had been charged under the crime of *usurpação* provided in Article 195 CDADC. Under Articles 195(1) and 197(1), anyone who, without the necessary authorisation, uses a work or other subject matter protected by related rights in any of the restricted ways defined in the CDADC shall be punished with imprisonment of up to three years or with a fine of 150 to 250 days, according to the seriousness of the offence. The Court concluded that the website manager had played an active role, by having knowledge of and selecting the content that was made available through its website (and was therefore ineligible for the E-Commerce safe harbours), and sentenced him to 8 months in prison.

BTuga, however, could not be characterised as a “good faith” provider, but rather as a Pirate Bay-like platform. To the best of my knowledge, there is no case law in Portugal on the primary criminal liability of good faith hosting providers.

Criminal liability for the behaviour of third parties (secondary criminal liability) will exist only in very few and exceptional cases, as Portuguese criminal law does not generally allow for the imposition of criminal liability for the conduct of third parties. Having said this, someone can be held criminally liable for third party behaviour if that person voluntarily (i.e., with malice) assists in the execution of the crime. Thus, regarding particular cases of criminal offenses perpetrated on the Internet, an intermediary will only be found liable if it knowingly aids someone in committing the crime. In such cases, intermediaries will be punished as accomplices (Article 27 of the Portuguese Criminal Code). Thus, if the intermediary wilfully fails to remove or disable access to the criminal content, then criminal liability may arise. These, however, will be exceptional cases and they will not concern good faith providers, given that intent is required.

### **AC 5: Scope of protection**

- 7. In your national jurisdiction prior to the transposition of the CDSMD did the service providers targeted by the LNI benefit from the protection of an immunity (e.g., the national implementation of the hosting safe harbour provided by Article 14 of the ECD (Directive 2000/31/EC))? If so, does this provision continue to apply?**

Yes, and the provision still exists in national law (Article 16 of Decree-Law 7/2004). However, like the Directive, Article 175-B(4) CDADC expressly excludes its applicability in Article 17-type of situations.

- 8. Does the LNI provide an immunity for targeted service providers against the protection it introduces? If so, please describe the conditions for this immunity. To the extent that such conditions relate to obligations to take action against infringing content, please distinguish between obligations to take action against current infringing content and obligations to take action against future infringing content.**

The immunity provided in Article 175-C(1) and (2) CDADC is a literal transposition of Article 17(4) and (5) CDSMD.

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<sup>1</sup> Judgment of the of 2<sup>nd</sup> Criminal District Court of Lisbon, case no. 1386/06.9JFLSB.

- 9. Does the LNI identify a standard of care to which targeted service provider should adhere in relation to the conditions of the immunity? For example, the Directive makes reference to “best efforts” and to “high industry standards of professional diligence”. Please also discuss whether you consider any such terms used in the LNI to represent accurate translations of the corresponding terms in the EU provision, preferably taking into account both the English language and the national language versions.**

The Portuguese translation of the CDSMD, in Article 17(4)(a), mistakenly translated “best efforts” as “*todos os esforços*” (all efforts). However, the LNI uses the expression “*melhores esforços*”, which is a literal translation of “best efforts”. The expression “high industry standards of professional diligence” was accurately translated both in the Portuguese version of the Directive and in the LNI.

- 10. Are the conditions for the immunity in the LNI subject to the principle of proportionality? If so, please describe any specified implications.**

Yes. Again, a literal transposition.

- 11. Do the conditions of the immunity differ depending on the characteristics of the specific service provider (e.g., size or age)? If so, please describe those differences, providing any relevant definitions.**

Art. 175-D(1) and (2) CDADC is a verbatim transposition of Article 17(6) CDSMD. However, the clarification in recital 67 CDSMD was also included in Art. 175-D(3) CDADC.

#### **AC 6: Right-holder cooperation**

- 12. Does the LNI depend the conditions of the immunity on right-holder cooperation? If so, please describe what cooperation is expected of right-holders.**

Again, a literal transposition of Article 17. As in the Directive, the expressions “relevant and necessary information” and a “sufficiently substantiated notice” are used, but left undefined.

- 13. Does the LNI allow right-holders to “ earmark” content the unauthorised online availability of which could cause them significant economic harm? If so, please provide any definitions and conditions that govern such earmarking and describe any special regime set in place for earmarked content.**

No, the earmarking mechanism suggested by the Commission was not adopted by the Portuguese legislator.

#### **AC 7: General monitoring**

- 14. Does the LNI permit the conditions of the immunity to result in general monitoring? If not, please explain how “general monitoring” is defined.**

The caveat in the first part of Article 17(8) was *not* included in the LNI. Nevertheless, the prohibition against general monitoring is provided in Decree-Law 7/2004, which transposed the E-Commerce Directive.

- 15. Does the LNI recommend or dissuade from using any specific kind of technology in order to adhere to the conditions for immunity? If so, please describe.**

No reference is made to any specific kind of technology.

### **AC 8: Exceptions and limitations**

**16. Prior to the adoption of the LNI, did national law provide for an exception or limitation to copyright for uses for the purpose of a) quotation, criticism and review; and b) caricature, parody or pastiche? If not, has it now introduced such exceptions or limitations? Please describe the conditions under which such exceptions or limitations apply.**

Before the transposition, Portuguese copyright law provided for a quotation exception, but *not* for a parody exception. Of all the exceptions in the Article 5 ISD catalogue, this was the only exception that Portugal had not implemented. With the transposition of the CDSMD, the Portuguese legislator finally adopted a (general, not Article 17-limited) parody exception, implementing Article 5(3)(k) ISD in a literal manner.

The quotation exception exempts the “insertion of quotations or summaries from third party works, of whatever kind and nature, in support of one’s own doctrines or for the purposes of criticism, discussion or teaching, and to the extent justified by the objective to be achieved”. Moreover, the quotations cannot be “so extensive as to undermine interest in the quoted works”.

**17. Do other exceptions or limitations apply to the protection provided by the LNI? If so, please describe.**

All exceptions provided in Portuguese law – which includes all exceptions in Article 5 ISD and a few others that already existed prior to that transposition – apply. Article 175-I CDADC does a literal transposition of the first paragraph of Article 17(7) CDSMD.

### **AC 9: Licensing**

**18. Does the LNI include provisions on the licensing (incl. systems of extended collective licensing) of relevant uses? If so, please briefly describe any relevant details. For example, these could involve the following:**

- **criteria for determining the height of compensation;**
- **the process for negotiating compensation;**
- **transparency duties (incl. data sharing obligations);**
- **duties to engage in negotiations;**
- **oversight by a government authority;**
- **(mandatory) collective rights management.**

No. Literal transposition.

**19. Under the LNI, do licenses obtained by a platform cover the platform’s users and/or the other way around? If so, please explain.**

Literal transposition. Licenses obtained by a platform cover the platform’s users, as long as they are not acting on a commercial basis or where their activity does not generate significant revenue.

### **AC 10: Legitimate uses: *ex ante* safeguards**

**20. Does the LNI include a concept of “legitimate uses”? If so, how are these defined? How are legitimate uses treated?**

No. The only “legitimate uses” that are safeguarded are those that are covered by copyright exceptions.

**21. Does the LNI include a concept of “manifestly infringing uploads”? If so, how is this defined? How are “manifestly infringing” and “non-manifestly infringing” uploads treated?**

No (even though identical language had been used in the transposition of the E-Commerce Directive, back in 2004).

**22. Does the LNI include other *ex ante* mechanisms for the avoidance of action against legitimate content? If so, please describe these citing the relevant provisions of national law.**

No.

**AC 11: Legitimate uses: *ex post* safeguards**

**23. Does the LNI provide for effective and expeditious complaint and redress mechanisms in the event of disputes? If so, please describe these. If applicable, please include information on time limits, decision-makers, procedural steps and whether any review is performed by humans.**

Yes. The LNI transposes the first and second paragraphs of Article 17(9) (including the human review part), with some additional details, specifically:

- Platforms shall inform the entities that have requested the removal or blocking of the submission of a complaint by users, so that the former can respond.
- Where removal or blocking is carried out, platforms shall inform users of such removal or blocking and of the reasons justifying it.
- Where, following a complaint, content is made available again, platforms shall inform interested parties of the decision and the reasons justifying it.
- This procedure shall be made available and carried out in Portuguese.

**24. Does the LNI foresee for any other ways of settling disputes over content posted on their platforms (e.g., out-of-court mechanisms or recourse to the courts, incl. collective redress)? If so, please list these.**

Yes. Under Article 175-G CDADC, disputes between platforms and their users arising from the removal or blocking of content are subject to arbitration when, at the express choice of said users, the disputes are submitted to the assessment of a specialised arbitration centre. While it is provided that the decisions of this arbitration centre may be appealed to the Court of Appeals, no other reference is made to the possibility of resorting to courts. At the time of writing, however, this centre is still to be established and further regulated by the Government.

**AC 12: Sanctions**

**25. Does the LNI foresee sanctions in cases of abuses of the procedures it introduces by right-holders, users and/or platforms? If so, please describe these.**

No.

### **AC 13: Information obligations**

**26. Does the LNI impose information obligations on platforms? If so, please describe these.**

Yes. Article 175-E CDADC literally transposes Article 17(8)(ii) and Art. 17(9)(iv) CDSMD.

### **AC 14: Waiver**

**27. Can right-holders waive the rights provided by LNI? Can authorisation be given for free?**

The right of communication to the public is an economic right. As such, unlike moral rights, the right is waivable under Portuguese law. Moreover, nothing in the CDADC prevents the authorisation from being granted for free.

### **AC 15: Entry into effect**

**28. From what date did the protection provided by the LNI come into effect in your jurisdiction?**

The *vacatio legis* period provided in the LNI was 15 days from the date of publication in the Official Journal, meaning that the law came into effect in early July 2023.

### **Additional information**

**29. Does the LNI explicitly address the relationship between the protection it provides as against OCSSPs and fundamental or human rights (whether of OCSSPs or third parties)?**

No.

**30. Can you think of any noteworthy divergence in the LNI from the standards set out in Article 17 of the CDSMD that you have not already addressed above? If so, please elaborate.**

No.