
Intellectual Property, Media and IT

Newsletter | Portugal

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I. The new side of trade-secret protection

On December 10, Decree-Law No. 110/2018 of December 10 enacted the new Portuguese Industrial Property Code (IPC). It is a legislative change that stands out for its transposition into Portuguese law of two important Directives: Directive (EU) No. 2015/2436 of the European Parliament and of the Council of December 16, 2015, to again approximate the laws of the Member States in relation to trademarks, and Directive (EU) 2016/943, of the European Parliament and of the Council of June 8, 2016, on the protection of undisclosed know-how and confidential business information (trade secrets) against their unlawful acquisition, use and disclosure.

Specifically, this second Directive alters the way the matter had been dealt with in the IPC. Until the entry into force of the new IPC, trade or business secret protection was configured, though ring-fenced, as unfair competition. So, before this amendment, article 318 of the IPC (in respect of "Protection of undisclosed information") provided that the "Under the terms of the preceding article [under the heading "Unfair Competition"], the disclosure, acquisition or use of trade secrets of a competitor without its consent constitutes an unlawful act, provided that (...)". Next, the conditions were listed for the existence of trade secret (secret information that, having this characteristic has commercial value and whose secrecy is diligently protected by its holder). This definition was not changed in the new IPC, only the configuration it will assume in the Portuguese legal system.

In fact, in the new version of the IPC a whole new chapter (Chapter II) is created in Title III of the IPC, which takes the name of "Protection of Trade Secrets". This new configuration begins by definitively separating trade secret and unfair competition, thus making room for a figure that embodies a new industrial property right, as it were, that can be brought into play without making mention of unfair competition.

Despite altering the paradigm of trade secret, this new chapter does not go much beyond a transposition of the Directive into Portuguese law. In fact, the regime set out in the three articles that make up the new chapter of the IPC (articles 313, 314 and 315) is the one contained in the Directive.

Thus, the first of these articles defines trade secret (moving away, as we have seen, from the figure of unfair competition, while maintaining the requirements) and delimits the scope of its protection.

In their turn, in keeping with the directive, articles 314 and 315 set some standard situations of obtaining, using and disclosing trade secret, illegal or permitted, respectively.

Lastly, and without prejudice to the provisions of the Criminal Code that could possibly apply in this matter, one must also make mention of article 331 of the new IPC, which because of



the less rigid discipline of the directive in the matter of sanctions, introduces a set of penalties for those who violate protected trade secrets (defined in accordance with the above provisions) as, indeed, the IPC traditionally does for the various industrial property rights. It is a rule of a merely administrative offence nature, in which fines are set that may vary between €5,000.00 and €100,000.00 if the offender is a legal person. If the offender is a natural person, the fine can vary between €1,000.00 and €30,000.00.

The penalty regime provided for in these terms is frankly more complete than that set out in the previous version of the IPC, which (oddly enough) also was contained in the respective article 331, in which the applicable penalties to the performance of acts of unfair competition listed in articles 317 and also 318 are listed (concerning “Protection of undisclosed” information).

We conclude with a note that these new rules on trade secret entered into force on January 1, 2019, contrary to what happens with the other rules of the new IPC, which will come into force on July 1, 2019.

II. National Legislation

Decree-Law No. 78/2018

Amends the legislation applicable to distance contracts and off-premises contracts, completing the transposition of Directive (EU) 2015/2302;

Law No. 65/2018

Authorises the government to adopt a new Industrial Property Code, transposing Directives (EU) 2015/2436 and (EU) 2016/943, and to amend the Laws 62/2011 of December 12, establishing a system of settlement of disputes arising from industrial property rights when what is at issue are reference medicines and generic medicines, and 62/2013 of August 26, the Judiciary System Organisation Act;

Regulation No. 798/2018 from National Data Protection Commission

Approves the list of personal-data processing subject to impact assessment on data protection;

Decree-Law No. 110/2018

Enacts the new Industrial Property Code, transposing Directives (EU) 2015/2436 and (EU) 2016/943;



III. Case law

Judgment of the Court of Justice of the European Union, Judgement of 2 October 2018, Case C-207/16

“The Court of Justice recalls that access by public authorities to personal data held by electronic communications service providers, within the scope part of a criminal investigation, is covered by the scope application of the directive. The CJEU states that this interference does entail such gravity that the said access should be limited, in the matter of prevention, investigation, detection and prosecution of criminal offenses, to the combat against serious crime”.

Judgment of the Court of Justice of the European Union, Judgement of 18 October 2018, Case C-149/17

The owner of an Internet connection used for copyright infringements through file-sharing cannot be held liable to pay damages if he can name at least one family member who might have had access to that connection, without providing further details as to when and how the internet was used by that family member.

IV. Resolutions, Recommendations, Opinions and Others

Regulation (EU) 2018/1724 of the European Parliament and of the Council of 2 October 2018 establishing a single digital gateway to provide access to information, to procedures and to assistance and problem-solving services and amending Regulation (EU) No 1024/2012 Text, establishing the rules for the Internal Market Information System ("IMI").

New EU customs action plan on the fight against infringements of intellectual property rights (IPR) enacted on October 9 by the Council of the European Union, which will be in force until 2022. This action plan aims to ensure effective customs control of respect for the IPR and to combat trade in goods that infringe these rights.

Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018, on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No. 1247/2002/EC.

Regulation (EU) 2018/1807 of the European Parliament and of the Council, of 14 November 2018, on a framework for the free flow of non-personal data in the European Union.



DECO announced that it has filed with the court a **lawsuit against Facebook** demanding "compensation" of up to 2,000 euros per user "for the misuse of data of the users of this social network".

Commission Decision (EU) 2018/1927 of 5 December 2018, laying down internal rules concerning the processing of personal data by the European Commission in the field of competition in relation to the provision of information to data subjects and the restriction of certain rights

Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018, establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office), amending Regulation (EU) 2015/2120 and repealing Regulation (EC) No 1211/2009.

Directive (Eu) 2018/1972 of the European Parliament and of the Council of 11 December 2018, establishing the European Electronic Communications Code (Recast).



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