

Kluwer Copyright Blog

A summary look at the Portuguese transposition of the CDSM Directive

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The belated Portuguese transposition of the [CDSM Directive](#) was finally published in the Portuguese Official Journal (Diário da República) on the 19th of June 2023. The approved [Decree-Law 47/2023](#) to a large extent corresponds to a legislative project ([Project 52/XV](#)), which, in turn, was a variation of a previous project ([Project 114/XIV](#)) that failed due to a political crisis that led to early elections in the country. Generally speaking, the approved transposition follows the text of the Directive rather closely, similarly to other delayed implementations [such as the Irish one](#), without embracing a more “creative” legislative design, as has been the case for instance in [Germany](#) and [Greece](#).



Museu do Azulejo by G.P.

In addition to significantly changing the [Portuguese Copyright Code](#), the Decree-Law also affects [Law 26/2015](#) on collective management organizations and [Decree-Law 122/2000](#) on databases, and creates a new dispute resolution mechanism called “specialized institutionalized arbitration and mediation in matters of copyright and related rights”. This dispute resolution mechanism is possibly the main highlight of the Portuguese transposition, as it has a much wider scope than that envisioned in Art. 21 CDSM Directive, has some technical deficiencies and still requires further regulation.

Copyright exceptions for scientific, educational, and cultural purposes

The Portuguese Government honored the [mandate received by the national Parliament](#) without changing the legislative design of the Portuguese Copyright Code in this matter. Art. 75.º Copyright Code still regulates all the permitted uses of protected works and other subject matter, while Art. 76.º sets all the respective requirements that these permitted uses need to fulfil to be lawful. Both these (already articulated) provisions became even longer, as several new exceptions were added, among which the following mandatory exceptions:

- ***digital teaching exception***, regulated in Art. 75.º2-g: the Portuguese transposition did not opt for any licensing carve-out nor any fair compensation schemes. It puts forward a unique wording, though, permitting the use of works “which have previously been made available to the public in any territory belonging to the European Union or equivalent”. Also worth noting is that, from the wording of the legislative proposal sent for public consultation, the provision lists as beneficiaries of these permitted uses not only students and teachers but also “technical staff members” of the educational institutions;
- ***text and data mining exceptions***, in Art. 75.º2-v and -w: no significant divergences can be detected from the text of the CDSM Directive. There is no indication of the permitted “extraction” from databases (only reproduction of works), nor does the new article establish a specific quantitative duration of retention of the copies (for “as long as it is necessary for the text and data mining activities, including their verification”). Worth noting is that the implementation of Art. 3 CDSM Directive is the first mention of scientific research purpose in the Portuguese legal framework on copyright exceptions. However, no other broad-spectrum scientific research exception is yet to be found in the Copyright Act; and
- ***cultural heritage preservation exception***, in Art. 75.º2-y: this provision raises two major concerns. The first is of redundancy, as the Portuguese Copyright Code already provides for an exception for cultural heritage institutions to reproduce works for the purpose of preservation in its Art. 75.º2-e. The second problem arising is the potential incompatibility with EU law: the CDSM Directive does not allow for this type of exception for cultural preservation to require a fair compensation to be paid to the copyright holders. However, Art. 75.º2-e does require the payment of an equitable remuneration, as set forth in Art. 76.º1-b.

With regards to the imperative nature of these new exceptions, it is worth noting that the Portuguese Copyright Code already treats all its exceptions and limitations as not contractually overridable.

Beyond the obligations imposed by Articles 3-6 CDSM Directive, the Decree-Law also adjusts the Portuguese legal framework on copyright exceptions in light of Articles. 15 and 17 CDSM Directive. Respectively, it introduces a technologically neutral (not only online) *parody, caricature, and pastiche exception* in Art. 75.º2-x Copyright Code. It also shrinks the scope of the existing *press review exception*, enshrined in Art. 75.º2-c, which used to permit any regular selection of press articles for the purpose of press review, and now only allows those that do not have the objective of obtaining direct or indirect economic or commercial profit.

This latter amendment was not requested by the CDSM Directive and represents a legislative change with a potentially major impact on societal practices and press freedom. The same goes for the decision to add the obligation of an equitable compensation to the so-called anthologies exception (Art. 75.º2-i), i.e. for the inclusion of short extracts of works in educational materials.

Press publishers' right and OCSSPs liability rules

The press publishers' right is now included amongst the neighboring rights (and the corresponding sections are applicable as per Articles 176.º and 183.º). The law is silent regarding the possibility of transferring and waiving this right, which suggests such possibilities to be lawful. Art. 188.º-A faithfully follows the text of Art. 15 CDSM Directive, whereas Art. 188.º-B goes beyond the Directive and details the criteria used to establish the fair compensation due, the duties of information from information society services, and the limits thereof.

Art. 17 CDSM Directive was split into nine articles (Articles. 175.º-A to 175.º-I) and included in a separate specific section of the Copyright Code. These articles, which will also apply to neighboring rights (as per Art.192/2), mostly follow the text of the Directive. However, the Portuguese legislator also chose to turn one sentence from Recital 66 into Art. 175.º-I, which reads “The provisions of this Section shall not result in works or other protected subject-matter uploaded by users of an online content-sharing service not infringing copyright or related rights, including uses covered by an exception or limitation”.

Copyright contract safeguards and other additions to the Portuguese Copyright Code

Most copyright contract rules required by the CDSM Directive are not innovative in light of the existing Portuguese copyright rules. Nevertheless, it was decided to closely follow the text of the Directive and include, from scratch, Articles 44.º-A to 44.º-E. The contract adjustment mechanism and other contractual safeguards explicitly apply to commissioned works and work-for-hire ex Art. 14(5), as well as to publishing and translation contracts (Articles 105 and 170). Art. 44.º-B/1 seems to unduly restrict the information duties in the cases of (only) exclusive licenses or assignments, which appears to contradict Art.19 CDSM Directive.

The Decree-Law also complies with the obligations stemming from Articles. 8-11 CDSM Directive by slavishly transposing the provisions to promote the use and availability of *out-of-commerce works* in cultural heritage institutions, now regulated ex Articles. 74.º-B and 74.º-D of

the Copyright Code.

Portugal has eventually also opted for introducing the *extended collective licensing scheme* suggested by Art. 12 CDSM Directive, even though this had not been included in any of the prior legislative proposals drafted by the Government. Articles 36.º-A and 36.º-B of the Law on Collective Management (Law 26/2015) now provide for the possibility for main collecting societies operating in Portugal to extend the effect of their licenses to right holders who did not give any mandate. Such collecting societies need to adequately publicize and communicate their intention to avail themselves of the extended effect of their licensing to the governmental office for the General Inspection of Cultural Activities (IGAC).

Overall and less surprisingly, Portugal adds to the list of countries boasting a minimalist transposition of the CDSM Directive, with little attention being paid to enhancing the systematic ordering of national copyright rules. The resulting amended Copyright Code is inevitably modernized in some of its provisions, but globally significantly harder to interpret. Among the aspects that will deserve careful inquiry are, as highlighted above, the establishment of the specialized arbitration and mediation body and of the extended collective licensing options, the compensation schemes attached to the exceptions for cultural heritage preservation, inclusions in anthologies, the reduced scope of the press review exception, and the scope of the informational duties for the benefit of authors/performers. From a comparative legal perspective, being left with this degree of legal uncertainty does not seem to be the exception, and, in Portugal, the feeling is of expected litigation and perennial waiting for further guidance from the CJEU.

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