

INFORMATION, COMMUNICATION & TECHNOLOGY

MONITORING, CONTROL, REMOVAL AND
PREVENTION OF ACCESS TO PROTECTED
CONTENT IN THE DIGITAL ENVIRONMENT

VdA EXPERTISE



December 2021

Law no. 82/2021 was published, approving the rules and procedures for the monitoring, control, removal and prevention of access to protected content in the digital environment, and imposing new obligations on intermediary networking service providers.

On the 30th of November 2021, Law no. 82/2021 was published, approving the rules and procedures for **monitoring, controlling, removing and preventing access** to content protected by copyright and related rights in the digital environment, and creating new obligations for intermediary networking service providers (hereinafter the "Law").

This Law excludes online content sharing service providers from its scope of application, since they are subject to the specific regime on copyright and related rights arising from Directive (EU) 2019/790, of the 17th of April 2019, which will soon be transposed in Portugal; but it impacts, namely:

- i. Those **responsible for making available** the content protected by copyright and related rights (hereinafter, "responsible parties");
- ii. The **intermediary networking service providers**, namely those providing Internet access services, content association services (search engines) and storage services (hereinafter, "providers");
- iii. The **holders of the infringed copyright or related rights** (hereinafter, "rightsholders"), or their representative collective management organizations.

This Law will come into force already on the 29th of January 2022.

In general terms, this Law establishes:

- the **competence of *Inspeção-Geral das Atividades Culturais* (IGAC) to monitor and control the access to protected content**, and of its respective **general inspector of cultural activities** to determine the removal or prevention of access to such content;
- the procedure for the **submission of a complaint** to IGAC by the holder of the **infringed copyright or related rights**, or by their representatives;
- the obligations of the **intermediary networking service providers**, whose non-compliance may give rise to **administrative offences** punishable by fines of between €5.000 and €10.000, for which IGAC is competent;
- the procedure for the **appeal against decisions made by IGAC**.

Complaint

The complaint submitted to IGAC **must contain**, namely:

- (i) The elements allowing the identification of the **electronic location** where the protected content is made available, the **protected content** itself, its respective **rightsholders**, and any **collective management organizations** which represent them;
- (ii) When possible, the **identification of the alleged responsible** for the making available of the content and the intermediary **hosting service provider**;
- (iii) **Declaration**, under oath, that the making available of the protected content was **not authorized** by the rightsholders or their representatives.

IGAC shall **notify the final decision** regarding the complaint to the complainant, the responsible for the making available of the content and, whenever possible, the intermediary hosting service provider.

Monitoring and blocking the content

Without prejudice to possible criminal liability, the **responsible party is notified by IGAC**, along with the intermediary hosting service provider, to, within 48 hours, **cease the unlawful making available** of protected content¹ and **remove** the service or content.

This notification is made no later than **10 days** after:

- i. A **complaint** by an injured rightsholder or their representative is submitted; or
- ii. The **discovery**, by IGAC, of an Internet website or service which unlawfully makes available protected content.

If the making available has not ceased within 48 hours, IGAC **notifies the providers** to, in turn, **remove or prevent access** to the protected content.

There is no notification:

- of the **responsible party**, when **(i)** the 48 hours' prior notice substantially reduces the usefulness of the removal or prevention of access, or **(ii)** it is not possible to identify or contact them → in this case, the provider is immediately notified;
- of the **provider**, when there are reasonable doubts regarding the ownership of the rights or the legitimacy of the use of the content.

The removal or prevention of access remains in effect:

- i. When the provider is immediately notified, **until the ceasing of the unlawful activity**, but never for more than 48 hours;
- ii. For a **maximum period of 1 year**, unless the interested party can demonstrate that they have put an end to the unlawful behavior; or
- iii. Until the **decision of the termination of its effects** by IGAC or a competent authority.

However, in the last two cases, an extension of the effects of the measures may be requested before the expiration of the aforementioned periods.

¹ **Protected content is unlawfully made available** when one: (i) communicates, makes available to the public or stores the contents without the rightsholders' authorisation; (ii) makes available services or means intended for infringement of rights by third parties, or for interference with the normal and regular functioning of the works and services market; or (iii) makes available services intended for the circumvention of effective technological measures for the protection of rights, or information devices for the electronic management of those rights.

Obligations of the intermediary networking service providers

The obligations set forth in this Law apply to the providers of:

- i. Simple transportation and *Internet* access services;
- ii. Networked content association services (search engines); and
- iii. Hosting services, if the protected content is hosted in their servers.

These providers are obliged to:

- **Remove or prevent the access, the making available and the use of protected content**,² within 48 hours of their notification or, where this period would substantially reduce the usefulness of the removal or prevention of access, within the shortest possible time;
- **Immediately inform IGAC** when they become aware of **manifestly unlawful activities** carried out through the services they provide;
- **Comply with requests for identification** of the recipients of services with whom they have hosting agreements.

It is important to note that **providers cannot be held responsible** for measures adopted in compliance with an instruction by IGAC.

Appeal against a judicial decision and subsidiary law

Anyone who is **directly and effectively harmed** by a decision of IGAC of removal or prevention of access, or of refusal to apply said measures, may appeal to *Tribunal da Propriedade Intelectual* (Intellectual Property Court), within **30 days** from the notification of said decision.

² Through the **prevention of access to a given IP** only if that IP address is typically and essentially, or repeatedly and recurrently, used for the unlawful making available of protected content, with other uses being non-existent or residual.

Additionally, and although this is an administrative procedure, it should be noted that IGAC's procedure is subsidiarily subject to the Portuguese Code of Civil Procedure.

Final remarks

This Law follows on from Law no. 27/2021, of 17 May, which approved the Portuguese Charter of Human Rights in the Digital Era, namely its Article 16(2), which affirmed the need for a special law to define the rules that would prevent the access and demand the removal of contents made available in manifest violation of copyright and related rights

However, it is not clear how this Law articulates with the Protocols previously signed between IGAC and the rightsholders and providers, precisely to respond to the making available in the digital environment of protected content.

On the other hand, this Law also comes in the wake of some "hardening" of the applicable regime to the intermediary networking service providers, which has been expressed over time by the European Commission in several Communications and in some *ad hoc* proposals, such as the *Digital Services Act* and the *Digital Markets Act*, currently under discussion.

Finally, this Law is not entirely clear in its articulation with Directive (EU) 2019/790, namely the exclusion in Article 1(2) of online content sharing service providers, since the issues under discussion do not appear to be exactly the same.

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