

# Trademarks

*Contributing editors*

**Claus Eckhardt and Christine Fluhme**



2019

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# Trademarks 2019

*Contributing editors*

**Claus Eckhardt and Christine Fluhme**  
**Bardehle Pagenberg Partnerschaft mbB**

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Publisher  
Tom Barnes  
[tom.barnes@lbresearch.com](mailto:tom.barnes@lbresearch.com)

Subscriptions  
James Spearing  
[subscriptions@gettingthedealthrough.com](mailto:subscriptions@gettingthedealthrough.com)

Senior business development managers  
Adam Sargent  
[adam.sargent@gettingthedealthrough.com](mailto:adam.sargent@gettingthedealthrough.com)

Dan White  
[dan.white@gettingthedealthrough.com](mailto:dan.white@gettingthedealthrough.com)



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# Preface

## Trademarks 2019

Fifteenth edition

**Getting the Deal Through** is delighted to publish the fifteenth edition of *Trademarks*, which is available in print, as an e-book, and online at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

**Getting the Deal Through** provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on the Bahamas, Greece, Saint Lucia and Ukraine.

**Getting the Deal Through** titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

**Getting the Deal Through** gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. Getting the Deal Through would like to extend special thanks to the contributing editors Claus M Eckhardt and Christine Fluhme of Bardehle Pagenberg Partnerschaft mbd for their assistance with this edition.

GETTING THE  
DEAL THROUGH 

London  
September 2018

# Portugal

Patricia Rodrigues

RCF – Protecting Innovation, SA

## 1 Ownership of marks

### Who may apply?

Any individual or legal entity that has a lawful interest, in particular traders or manufacturers, may apply.

## 2 Scope of trademark

### What may and may not be protected and registered as a trademark?

#### Registrable signs

Any sign or group of signs capable of being graphically represented, namely, words, including personal names, designs, letters, figures, sounds, the shape of a product or the packaging thereof, slogans, combination of colours, which are capable of distinguishing the goods or services of an undertaking from those of another undertaking.

#### Kinds of trademarks

Trade and service marks, and collective marks (which may be made up of signs or indications used in trade to designate the geographical origin of products or services). Collective marks encompass certification marks (a particular sign owned by a legal person who controls goods or services or sets the rules by which those should abide) and association marks (which consist of particular signs owned by an association of natural or legal persons whose members use or intend to use the same for goods or services).

#### Not registrable

Marks likely to cause confusion with others previously registered or involving a 'risk of association' therewith; marks consisting exclusively of signs or indications used in commerce for designating kind, quality, quantity, purpose, value, place of origin of the products or time of production, as well as expressions considered of common use except where they have acquired a distinctive character in the commercial practice (secondary meaning); marks in which are included:

- flags, arms or other emblems of any states, without the consent of the competent authorities;
- official signs, seals and stamps, without authorisation;
- coats of arms, decorations and distinctions of honour not belonging to the applicant;
- medals likely to cause confusion with official decorations;
- business names, company names, insignia not belonging to the applicant, if not authorised by the owner;
- names or portraits other than those of the applicant;
- illicit reproduction of literary or artistic works;
- expressions or designs contrary to public order or morals; and
- false indications of source, nature, characteristics and utility of the products.

## 3 Common law trademarks

### Can trademark rights be established without registration?

Provisional protection is given to a trademark application. Total protection is given as from the grant of the trademark registration. Thus, the trademark rights are not established without registration.

Only registration confers proprietary rights. The effect of registration therefore is attributive of ownership.

## 4 Registration time frame and cost

**How long does it typically take, and how much does it typically cost, to obtain a trademark registration? What circumstances would increase the estimated time and cost of filing a trademark application and receiving a registration? What additional documentation is needed to file a trademark application?**

If no opposition is filed against the trademark application and if the application is filed with all the required documents, it usually takes around five months to obtain a trademark registration, plus another five months to obtain the registration certificate. The official fees for a trademark application currently amount to €126.17 for the first class, plus €31.99 for each additional class.

For the issuance of the related certificate of registration the official fees are €42.64 for the paper version and €16.00 for the digital version.

In order to proceed with a trademark application, we need the applicant's full data, that is, name, address and nationality, as well as the sign of the trademark in question in .jpg format, in the case of a device trademark. Industrial property attorneys also do not need a power of attorney.

## 5 Classification system

**What classification system is followed, and how does this system differ from the International Classification System as to the goods and services that can be claimed? Are multi-class applications available and what are the estimated cost savings?**

The applicable classification is the 11th edition of the International Classification of Goods and Services under the Nice Agreement.

Multi-class applications are available.

## 6 Examination procedure

**What procedure does the trademark office follow when determining whether to grant a registration? Are applications examined for potential conflicts with other trademarks? Are letters of consent accepted to overcome an objection based on a third-party mark? May applicants respond to rejections by the trademark office?**

After the time limit fixed for oppositions has elapsed (provided no oppositions have been made), or when the dispute has ended, examination is made as to form, inherent registrability and availability over prior marks.

Applications are examined for potential conflicts with other trademarks.

Letters of consent are accepted to overcome an objection based on a third-party mark.

Applicants can respond to rejections by the trademark office.

## 7 Use of a trademark and registration

**Does use of a trademark or service mark have to be claimed before registration is granted or issued? Does proof of use have to be submitted? Are foreign registrations granted any rights of priority? If registration is granted without use, is there a time by which use must begin either to maintain the registration or to defeat a third-party challenge on grounds of non-use?**

A registered mark should be used. If the mark is not subject to genuine use during five consecutive years, except for justified reasons, the registration may be declared as forfeited upon request by a third party. The computation of the first non-use period starts with the registration of the mark, which for international marks shall be taken as the date of registration of the same at the International Bureau (World Intellectual Property Organization).

## 8 Appealing a denied application

**Is there an appeal process if the application is denied?**

An appeal may be lodged at the Intellectual Property Court against the decision of the National Institute of Industrial Property (PTMO). Any of the interested parties may appeal against the sentence to the court of second instance.

## 9 Third-party opposition

**Are applications published for opposition? May a third party oppose an application prior to registration, or seek cancellation of a trademark or service mark after registration? What are the primary bases of such challenges, and what are the procedures? May a brand owner oppose a bad-faith application for its mark in a jurisdiction in which it does not have protection? What is the typical range of costs associated with a third-party opposition or cancellation proceeding?**

Within two months after the publication (term extendable for one month), any third party considering itself prejudiced by the possible grant of the registration may file an opposition. The applicant may file a counter-statement within two months (term also extendable for one month).

The opposition or the cancellation of a trademark can be requested in the following circumstances:

- that the person in whose name the registration of a mark was made was not entitled to acquire it;
- that the registration concerns a mark that was not registrable;
- that the grant of the registration infringes third-party rights based on priority or other legal title, and, in particular, that the grant infringes upon rights to an earlier mark, provided the use requirement in respect of that mark is complied with. Note, however, that no cancellation on this ground may be requested in the case of acquiescence in the use of the latter mark for five years;
- that the mark being the subject of the registration wholly or partly is an imitation, translation or reproduction of a mark that is well known in Portugal, and is used for the same or similar articles and there is danger of confusion;
- that the mark being the subject of the registration is graphically or phonetically identical or similar to an earlier mark being highly renowned in Portugal, irrespective of the goods or services for which it is applied, if use of the later mark without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the earlier mark; or
- that the grant of the registration infringed provisions requiring authorisation or consent and this has not been given.

The cancellation procedure may be started before the competent court within one year from the date of grant of the registration of the mark.

A brand owner that does not yet have its trademark protected in Portugal can oppose a bad-faith application.

The present official fees at the PTMO associated with a third-party opposition are €52.28 and for a cancellation proceeding are €10.46.

## 10 Duration and maintenance of registration

**How long does a registration remain in effect and what is required to maintain a registration? Is use of the trademark required for its maintenance? If so, what proof of use is required?**

The duration of registration of a trademark is 10 years from the granting date and is indefinitely renewable for further 10-year periods. See question 7.

## 11 The benefits of registration

**What are the benefits of registration?**

Only registration confers exclusive rights to a mark. Only registration confers proprietary rights. The effect of registration therefore is attributive of ownership.

Legal action against infringement of a trademark can be brought before the courts and it is thus possible to include claims for damages. The proceedings may be initiated by seizing the infringing goods namely at the customs houses if they are imported. Criminal penalties are set by the court (within the limits fixed in the Industrial Property Code) as well as compensation for damages. An action for infringement may also be initiated by means of a complaint filed with the Economic and Food Safety Authority requesting the preliminary seizure of the infringing goods, subject to the discretion of the public prosecutor who may subsequently bring a criminal action against the infringer.

## 12 Licences

**May a licence be recorded against a mark in the jurisdiction? Are there any benefits to doing so or detriments to not doing so?**

The property of a trademark can be totally or partially licensed, free of charge or in return for payment, in a certain area or throughout the country for the whole of the mark's duration or for a shorter time. The licence must be recorded in order to have an effect towards third parties.

Licence contracts must be drawn up in writing. Unless otherwise expressly stipulated, for legal purposes a licensee enjoys the faculties belonging to the holder of the right to which the licence applies, with the exception of the provisions of the following paragraphs.

The licence shall be understood to be non-exclusive. An exclusive licence is one in which the holder of the right renounces the faculty to grant other licences for the rights covered by the licence while it remains in effect.

The grant of an exclusive exploitation licence does not prevent the holder from also directly exploiting the right in the licence, unless otherwise stipulated.

Also, unless otherwise stipulated, a right obtained in an exploitation licence cannot be transferred without the written consent of the holder of the right.

If the grant of sub-licences is not provided for in the licence contract, then they may only be granted with the written authorisation of the holder of the right.

## 13 Assignment

**What can be assigned?**

The property of a trademark can be totally or partially assigned. The assignment must be recorded in order to have an effect towards third parties. If recordal of the assignment is requested by the assignor, the assignee should also be a signatory of the assignment document, or issue an express statement that he or she accepts the assignment.

## 14 Assignment documentation

**What documents are required for assignment and what form must they take?**

The requirements for registration of an assignment are a deed of assignment in Portuguese signed by the assignor and the assignee and certified by a notary public.



**15 Validity of assignment****Must the assignment be recorded for purposes of its validity?**

The recordal of the assignment is required in order to be valid.

**16 Security interests****Are security interests recognised and what form must they take? Must the security interest be recorded for purposes of its validity or enforceability?**

Security interests are recognised and must be certified by a notary public. They must be recorded for purposes of their validity in Portugal.

**17 Markings****What words or symbols can be used to indicate trademark use or registration? Is marking mandatory? What are the benefits of using and the risks of not using such words or symbols?**

Marking is optional. Possible markings are 'Marca Registrada', 'MR' or ®.

**18 Trademark enforcement proceedings****What types of legal or administrative proceedings are available to enforce the rights of a trademark owner against an alleged infringer or dilutive use of a mark, apart from previously discussed opposition and cancellation actions? Are there specialised courts or other tribunals? Is there any provision in the criminal law regarding trademark infringement or an equivalent offence?**

The owner of a trademark can ask for enforcement of the rights of its trademark against an alleged infringer. There is one specialised court for this matter, the Intellectual Property Court. Trademark counterfeiting, imitation and illegal use of a mark can also be considered as unfair competition or criminal offences under Portuguese law. The criminal are competent for judging such offences. The judge may rule based on the documents and other evidences filed by the parties or designate oral proceedings for witnesses to be heard. The decision is notified to the parties and the losing party may appeal to the court of second instance.

Criminal proceedings begin with the filing of a complaint by the trademark owner or its recorded licensee.

Regarding EU trademarks, there is a specific law on enforcement.

**19 Procedural format and timing****What is the format of the infringement proceeding?**

Only registration confers exclusive rights to a mark.

The following acts performed without the consent of the owner of a registered mark are deemed infringement:

- use in the course of trade in Portugal of any sign that is identical or confusingly similar to the registered mark for goods or services being identical or similar to those for which the mark is registered; and
- use in the course of trade in Portugal of any sign that, due to the identity or similarity of that sign and the mark or the affinity between the goods or services, creates in the consumer's mind a risk of confusion, including the risk of association of the sign with the mark.

The exclusive right to a mark does not include the right of the owner to prevent a third party from using, in the course of trade, his or her own name or address, or any indication concerning the kind, quality, quantity, intended purpose, value, geographical origin, time of production of the goods or of rendering of the services, or any other characteristics of goods or services, or even the mark itself if this is necessary to indicate the intended purpose of a product or service, in particular as an accessory or spare part, provided that in any such case the use is in accordance with honest practices and good customs in industrial and commercial matters.

The format of the proceedings depends on the court where the case is to be heard.

In civil proceedings with the Intellectual Property Court the trademark owner files a petition with the indication of the relevant facts and the applicable law. The defendant has the right to file a reply to the petition filed by the trademark owner.

In civil proceedings, written and testimony evidences can be produced. If the judge decides there are sufficient grounds for the proceedings to be proceed, a day will be set aside for a trial where witnesses can be heard. After a decision is given and notified to the parties, the losing party may file an appeal to the Court of Appeal.

In criminal proceedings the trademark owner files a criminal complaint against the infringer in order to grant the public prosecutor the necessary powers to investigate the case and proceed with the criminal proceedings. The decision by the public prosecutor can be to indict or close the file.

If the file is closed, the trademark owner may file a request for a finding of facts to overcome the decision of the public prosecutor.

In the case of indictment, the infringer may file a request for a finding of facts to overcome the decision of the public prosecutor.

Furthermore, when a request for a finding of facts is filed, a preliminary hearing is scheduled by the criminal court to see whether the decision of the public prosecutor was correct and a decision is given (indictment or closing the file).

If a decision to indict is made, the trial is scheduled by the criminal court. After the notification of the decision to indict, the trademark owner can file a petition for civil compensation for damage.

The trial is heard before a single judge and the public prosecutor in charge of the file. Finally, a decision is given by the criminal court of first instance. It is possible to appeal to the criminal court of second instance and, in some cases, appeal to the Supreme Court.

**20 Burden of proof****What is the burden of proof to establish infringement or dilution?**

The burden of proof lies with the plaintiff, who has the burden of proving that its mark has been infringed.

**21 Standing****Who may seek a remedy for an alleged trademark violation and under what conditions? Who has standing to bring a criminal complaint?**

Both the trademark owner and the licensee may seek remedies. The trademark owner must have the mark registered at the Trademarks Office and the licensee can only intervene if the registered user agreement (licence to use) is recorded at this office.

**22 Foreign activities****Can activities that take place outside the country of registration support a charge of infringement or dilution?**

Only activities that take place in Portuguese territory and in EU territory may be taken into account.

**23 Discovery****What discovery or disclosure devices are permitted for obtaining evidence from an adverse party, from third parties, or from parties outside the country?**

Adverse or third parties (including state entities) may be required to submit documents or exhibit goods. If they resist, a court order may be sought.

**24 Timing****What is the typical time frame for an infringement or dilution, or related action, at the preliminary injunction and trial levels, and on appeal?**

The typical time frame for infringement or dilution actions is around one to two years.



**25 Litigation costs**

**What is the typical range of costs associated with an infringement or dilution action, including trial preparation, trial and appeal?**

There is no typical range of costs. These depend mainly on the professional fees that are charged.

**26 Appeals**

**What avenues of appeal are available?**

An appeal can be lodged at the Intellectual Property Court against a decision of the PTMO, and an appeal against a decision made at the next instance can be filed at the Court of Appeal.

**27 Defences**

**What defences are available to a charge of infringement or dilution, or any related action?**

The defendant or alleged infringer has the legal right to participate in the proceeding by responding to the complaint and submitting evidence.

**28 Remedies**

**What remedies are available to a successful party in an action for infringement or dilution, etc? What criminal remedies exist?**

The IP Code contains provisions regarding the penalties imposed on an infringer, but is silent regarding the apportionment of monetary relief. Injunctive relief is available permanently if there is an immediate danger to the complainant.

**29 ADR**

**Are ADR techniques available, commonly used and enforceable? What are the benefits and risks?**

ADR techniques are available in Portugal.

In Portugal, Arbitrare was created as an arbitration centre competent to resolve disputes regarding industrial property matters, .pt domain names, trade names and corporate names. This centre resolves disputes between private parties or private parties and Portuguese registration bodies. For the resolution of these disputes, Arbitrare collaborates with renowned arbitrators.

The benefits of arbitration are:

- disputes are resolved within a maximum period of six months;
- arbitrators are experts in the areas of competence of Arbitrare;
- the arbitral award has the same value as a state court judgment;
- confidentiality is guaranteed in all procedural stages;
- electronic procedure, via a functional and secure online application process; and
- the proceedings can be carried out in the Portuguese or English.

One disadvantage usually associated with arbitral proceedings is that costs are substantially higher than those in judicial proceedings.

**30 Famous foreign trademarks**

**Is a famous foreign trademark afforded protection even if not used domestically? If so, must the foreign trademark be famous domestically? What proof is required? What protection is provided?**

In relation to the protection of well-known marks, registration is refused for marks that are entirely or partly a reproduction, imitation or translation of a mark well known in Portugal as being the property of a national of any EU country if applied to identical or similar goods or services, and that may lead the consumer into error or confusion, provided the owner of the well-known mark applies for its registration in Portugal.

Regarding protection of widely known marks, the application for registration of a mark is likewise refused if the mark, although intended for goods or services that are not similar, is graphically or phonetically identical or similar to an earlier mark that enjoys a wide reputation in Portugal or in the European Union and wherever the later mark, without due cause, aims at achieving an unfair advantage over or being detrimental to the distinctive character or the reputation of the earlier mark.

The evidence required includes market studies that reveal the reputation of the mark to the relevant public, costs with marketing companies, sales volume and other factors relevant to the reputation of the mark.



**Patrícia Rodrigues**

**mail@rcf.pt**

Rua do Patrocínio, 94  
1399-019 Lisbon  
Portugal

Tel: +351 213 9073 73  
Fax: +351 213 9787 54  
www.rcf.pt

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