



PERMANENT MISSION OF PORTUGAL
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The Permanent Mission of Portugal to the United Nations Office and other International Organizations presents its compliments to the Office of the High Commissioner for Human Rights and referring to the letter of the Special Rapporteur in the filed of cultural rights, dated 11 December 2013, has the honour to enclose the reply by the Portuguese Authorities to the questionnaire on the impact of advertising and marketing practices on the enjoyment of cultural rights.

The Permanent Mission of Portugal avails itself of this opportunity to renew to the Office of the High Commissioner for Human Rights the assurances of its highest consideration.

Geneva, 14 April 2014



Office of the High Commissioner
for Human Rights
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Questionnaire on the Impact of Advertising and Marketing Practices on the Enjoyment of Cultural Rights

1. Has your country adopted specific regulations on advertising and marketing methods and contents aimed at protecting human rights? If so, please specify the content of such regulation. Does the regulation apply both to off-line and on-line advertising?

The Portuguese legal framework regulating advertising contains specific rules aiming at protecting human rights. For example:

- Article 7 (1) and (2) of the Advertising Code (Law that establishes the general rules regarding advertising and other commercial communications)¹;
- Article 27, of the Television and On-Demand Audiovisual Media Services Law (although its scope is broader than advertising, the rules contained in this article are also applicable to it; see number 7);
- Articles 30 and 32 (1) of the Radio Law (although its scope is broader than advertising, the rules contained in these articles are also applicable to it)².

Advertising Code

Article 7

1 - It is prohibited advertising that, by its shape, object or purpose, offends the values, principles and institutions constitutionally enshrined³.

2 - It is prohibited, in particular, advertising that:

- a) Depreciatingly makes use of national or religious symbols or historical figures;*
- b) Promotes or incites to violence as well as any illegal or criminal activities;*
- c) Offends human dignity;*
- d) Contains any discrimination based on race, language, territory of origin, religion or sex⁴; (2)*
- e) Uses, without permission, the image or the words of a person;*
- f) Uses obscene language;*

¹ The Advertising Code in Portuguese can be accessed here: <http://www.gmcs.pt/pt/decreto-lei-n-33090-de-23-de-outubro-codigo-da-publicidade>

² The Radio Law and Television and On-Demand Audiovisual Media Services Law in English can be accessed here: <http://www.gmcs.pt/en/legislation>.

³ According to article 16 of the Portuguese Constitution within the scope of this rule are also the human rights enshrined in international conventions to which Portugal is a Party.

⁴ This rule must be interpreted in accordance with article 13 of the Portuguese Constitution (http://app.parlamento.pt/site_antigo/ingles/cons_leg/Constitution_VII_revisao_definitive.pdf) and, therefore, this prohibition also applies to advertising that contains any discrimination based on ancestry, political or ideological beliefs, education, economic situation, social circumstances or sexual orientation.

g) *Encourages behavior prejudicial to the protection of the environment;*

h) *Has as its object union, political or religious ideas.*

2. Please indicate whether specific categories of the population are protected by such regulation, such as children, women, minorities and indigenous peoples.

Yes, there are specific categories of people that are protected by such regulation. The Advertising Code (Decree-Law n. 330/90 of 23 October) has an entire article that regulates the advertising that is aimed at children - Article 14.

Article 14

Minors

1 - Advertising especially aimed at children should always take into account their psychological vulnerability, abstaining in particular from:

a) Directly encouraging minors, by exploiting their inexperience or credulity, to purchase a particular good or service;

b) Directly encouraging minors to persuade their parents or others to purchase the goods or services in question;

c) Containing elements which could endanger their physical or moral integrity, as well as their health or safety, including through pornography or incitement to violence;

d) Exploiting the special trust minors place in parents, teachers or tutors.

2 - Minors may only be major players in advertising on which there exists a direct relationship between them and the conveyed product or service.

Also, article 20 of the Advertising Code regulates the advertising in schools and in publications or programs aimed at minors:

Article 20

Advertising in schools or aimed at children

It is prohibited to advertise alcoholic beverages, tobacco or any kind of pornographic material in schools, as well as any publications, programs or activities specially designed for children.

The Radio Law (RL) and the Television and On-Demand Audiovisual Media Services Law (TODAMSL) also have specific rules regarding children. See articles 32 of the RL and 27 (3), (4) and (10), 34 (1), 40-B (3) and (5), 41-A (2) and (8) and 41-D (2) of the TODAMSL.

Other categories are also specifically protected by laws on advertising, such as the elderly and disabled people. See, for example, article 13 of the Advertising Code.

Article 13

Health and safety of consumers

1 - It is prohibited advertising that encourages behavior prejudicial to health and safety of consumers, in particular by insufficient information about the dangerousness of the product or special susceptibility of verification of accidents as a result of its use.

2 - Advertisements should not contain any visual presentation or description of situations where security is not respected unless justified by pedagogical intent.

3 - The preceding paragraphs should be particularly obeyed in the case of advertising especially aimed at children, adolescents, elderly or disabled people.

3. Is advertising covered by the general provisions on freedom of expression and/or does your country differentiate between commercial speech and non-commercial speech? Do specific regulations distinguish between advertising and other contents, and if so, which are the criteria used to make this distinction?

Yes, advertising is covered by the general provisions on freedom of expression. However, advertising is subject to stricter principles and rules, such as the principles of legality, truthfulness and respect for the rights of the consumers.

It is also important to note that advertising of products that can be considered potentially dangerous, harmful or unsuitable for children (such as tobacco, prescription medication, alcoholic beverages, fast food, etc.) is prohibited or subject to strict regulations.

The concept of advertising is defined in the Advertising Code as follows (non-official translation):

Article 3

Concept of Advertising

1 - For the purposes of this Ordinance, advertising is any form of communication made by public or private entities, in connection with trade, business, craft or professional activities, with the direct or indirect purpose of:

a) Promoting the sale of any goods or services;

b) Promoting ideas, principles, initiatives or institutions.

2 - Advertising can also be any form of communication of the Public Administration which has the direct or indirect purpose of promoting the supply of goods or services.

3 - For the purposes of this statute, political propaganda is not considered advertising.

4. Please provide a brief summary of any important decisions relating to advertising / marketing / sponsoring and human rights adopted by judicial authorities in your country over the last ten years.

It is not of our knowledge that over the last ten years judicial authorities have adopted specific or important decisions relating to advertising and human rights. However, it is important to underline that, AACCS – Alta Autoridade para a Comunicação Social (High Authority for the Media), which was at the time the independent media regulatory authority (in 2006 succeeded by ERC – Entidade Reguladora para a Comunicação Social, the media independent regulatory entity) has ruled (Resolution n.º 1439/2004) that all contents (advertising included) that do not safeguard human dignity

can only be transmitted between 23 pm and 6 am and have to display an appropriate visual identification during the broadcast of such content. The four main TV channels also made a self-regulation agreement concerning this subject.

5. Which authority (governmental and/or self-regulatory body) monitors the advertising sector? Are specific mechanisms in place to receive complaints from citizens on advertising methods and content?

There are several authorities (with sanctioning powers) that monitor and supervise advertising activities. The two main are ERC – Entidade Reguladora para a Comunicação Social (Regulatory Authority for the Media) and Direção-Geral do Consumidor (Directorate General for the Consumer). There are also some entities that monitor and supervise (with sanctioning powers) the advertising of certain sectors that are under their scrutiny, such as INFARMED (National Authority of Medicines and Health Products) that supervises the advertising of medication or the Insurance Institute of Portugal that monitors the advertising of insurances.

There are also self-regulatory bodies that monitor and supervise (with sanctioning powers) this activity. The main self-regulatory body is ICAP (Civil Institute of Self-Discipline in Commercial Communications) and it has several protocols and agreements with numerous stakeholders of the sector, such as CPMCS (Portuguese Confederation of Media Companies), APAN (Portuguese Association of Advertisers), APEPE (Portuguese Association of Outdoor Advertising) and with the three main TV corporations, among others.

There are specific mechanisms in place to receive complaints. Citizens can complain, according to the situation or the subject that is being treated, to any of the above mentioned authorities and entities.

6. Has your country adopted legislation on certain advertising or marketing practices such as neuromarketing or behavioral targeting? What challenges have been encountered in doing so?

Portugal has not adopted specific legislation concerning neuromarketing or behavioral targeting. However, it should be noted that general principles and rules on advertising apply to all advertising practices, including these.

There is legislation to regulate other specific advertising practices, such as advertising through electronic networks and direct marketing as well as advertising specially aiming at people when they are at home, including by post, direct distribution, telephone and fax.

7. Is the use of private data for commercial purposes regulated in your country? If so, please describe briefly such regulation.

Yes, the use of private data is regulated. It should be noted that being a member of both organizations, Portugal respects the strict principals approved by the Council of Europe and applies the European Union's legal framework.

Within the Portuguese legal framework regarding data protection it is worth highlighting Article 35 of the Constitution of the Portuguese Republic and the law concerning the protection of personal data (Law 67/98, of 26th October).

Constitution of the Portuguese Republic

Article 35

Use of computerized data

1. All citizens have the right of access to any computerized data relating to them and the right to be informed of the use for which the data is intended, under the law; they are entitled to require that the contents of the files and records be corrected and brought up to date.
2. The law shall determine what are personal data as well as the conditions applicable to automatic processing, connection, transmission and use thereof, and shall guarantee its protection by means of an independent administrative body.
3. Computerized storage shall not be used for information concerning a person's ideological or political convictions, party or trade union affiliations, religious beliefs, private life or ethnic origin, except where there is express consent from the data subject, authorization provided under the law with guarantees of non-discrimination or, in the case of data, for statistical purposes, which does not identify individuals.
4. Access to personal data of third parties is prohibited, except in exceptional cases as prescribed by law.
5. Citizens shall not be given an all-purpose national identity number.
6. Everyone shall be guaranteed free access to public information networks and the law shall define the regulations applicable to the transborder data flows and the adequate norms of protection for personal data and for data that should be safeguarded in the national interest.
7. Personal data kept on manual files shall benefit from protection identical to that provided for in the above articles, in accordance with the law.

Law 67/98, of 26th October ⁵

Article 7

Processing of sensitive data

- 1 – The processing of personal data revealing philosophical or political beliefs, political party or trade union membership, religion, privacy and racial or ethnic origin, and the processing of data concerning health or sex life, including genetic data, shall be prohibited.
- 2 – The processing of the data referred to in the previous number shall be permitted by a legal provision or by the authorization of the CNPD when, on important public interest grounds, such processing is essential for exercising the legal or statutory rights of the controller or when the data subject has given his explicit consent for such processing, in both cases with guarantees of non-discrimination and with the security measures provided for in Article 15.
- 3 – The processing of the data referred to in number 1 shall also be permitted when one of the following conditions applies:

⁵ Portuguese legislation concerning data protection (in English) can be accessed here: <http://www.cnpd.pt/english/bin/legislation/legislation.htm>