

BIRD & BIRD

**STUDY ON THE EVOLUTION OF NEW
ADVERTISING TECHNIQUES**

PORTUGAL

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- SUMMARY -

**This summary has been drafted by Bird & Bird Brussels
on the basis of the national report**

Television

The Portuguese audiovisual legislation can be found in the law 31-A/98 of 14 July 1998 (TV law). Portuguese legislation on audio-visual matters was last modified in 1998 to implement the TVWF Directive (Law of 30.7.1998).

We note that Portugal makes a distinction between public and private broadcasters.

1. Definitions

- **Advertising** is defined as “*any form of communication made by a public or a private undertaking in connection with trade, industrial activity, business, craft or profession in order to promote, directly or indirectly: a) the commercialisation of any goods or services, b) any ideas or principles, initiatives or institutions*”.
- **Sponsorship** is defined exactly the same as in the Directive TVWF.
- **Teleshopping** is defined similarly the same as in the Directive TVWF.
- **Other relevant definition:**
“Programmed duration”, consists in the extent of time of its effective transmission, excluding interruptions (advertising ones and others). This is important regarding the calculation of the duration of the maximum amount of advertising.

2. Advertising

a) **Rules on insertion in and between programmes**

Regarding the public broadcaster, there are some restrictions in terms of distribution of advertising on public broadcaster services. The restrictions are defined in each channel concession agreement.

The advertising breaks must be clearly identified as such by optical and acoustics means at the beginning and at the end of the break. The break must also mention the word “publicidade” (advertising), which is stricter than the Directive TVWF.

Advertising should be insert between the programmes. It is allowed to insert advertising in the programmes provided the respect of the same exceptions mentioned in the Directive TVWF.

b) Rules on the maximum amount of advertising

The amount of advertising depends on the type of channel:

- it should not exceed 15% of the daily transmission time in national channels with non-restricted access. However, this percentage may be increased to 20% to include other forms of advertising;
- it should not exceed 10% of the daily transmission time in national channels with restricted access.

The transmission time devoted to advertising and teleshopping spots within a given one-hour period should not exceed 10% or 20%, depending on whether it is in a restricted or non-restricted access channel.

3. Tele-shopping

The TV Law states that, thematic channels of self promotion and teleshopping shall not include any other elements of the conventional programming, such as news, sports transmissions, films, series or documentary programmes.

The TV law makes a distinction between:

- Regarding the national channels with non-restricted access, the transmission time devoted to advertising messages shall not exceed 15% of the daily transmission time. Except when it includes other forms of advertising or teleshopping messages, in which case, that limit may be increased to 20% of the daily transmission time. The transmission of teleshopping programmes can be of a maximum of 8 per day, while their total duration does not exceed 3 hours. A teleshopping set must have an uninterrupted duration of, at least, 15 minutes.
- Regarding the national channels with restricted access, the transmission of advertising or teleshopping messages shall not exceed 10% of the daily transmission time.

It should be noted that for these time limit, the informative messages transmitted by television broadcasters and those related with their own programmes and directly derived programmes, as well as teleshopping spots.

4. Sponsorship

The names and/or the logo of the sponsor must be clearly identified at the beginning and at the end of the programmes. Moreover, the name and/or the logo of the sponsor may also be inserted during the programmes, according to the television rules on advertising

insertion (see above). There is no provision concerning duration of sponsorship activities or other detailed rules on the content of the messages.

5. Product Placement - Surreptitious advertising

There is no legal, nor conventional definition of product placement. Nevertheless, product placement has already occurred. The special Commission responsible for the infringement to the Advertising Code states that product placement should be admitted within the same terms as sponsorship.

6. New advertising techniques

a) split screen techniques :

There is no specific (project of) regulation, nor decisions/guidelines of public authorities on this issue. National channels seldom use this technique.

b) virtual advertising

Both the special Commission and the courts have already decided several cases related to virtual advertising. All decisions have come up to the same conclusion: it is illegal because it violates the identification principles.

c) interactive advertising

Interactive television is currently on trial in Portugal (only a few viewers). For this reason, neither decisions, nor legislation have come up yet.

Radio

Advertising on radio is subject to less severe rules on duration and insertion than television advertising. Regarding the duration, the amount of advertising shall not exceed 20% of the daily transmission time.

Internet and Mobile Phone

Neither specific regulation, nor self-regulation on advertising, sponsoring or sales offers exists. The general rules of the Advertising Code apply, as the Internet is a medium of communication.

Neither specific regulation, nor self-regulation on mobile telephony advertising exists. The general rules of the Advertising Code apply.

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TELEVISION

I. Advertising

A. General regulation

1. General law on consumer protection containing rules on advertising applicable to all media. Regulatory entities and bodies.

Law 24/96 of 31 July 1996 (Portuguese Consumer's Protection Act - PCPA) states in article 7.4, as a general principle, that advertising shall be lawful, explicit, truthful and in accordance with the consumer's rights.

The PCPA also states (article 7. 5) that any clear and objective information contained in advertisement of any good, right or service makes part of any legally binding contract or deal celebrated after such advertisement.

Directive 84/450/EEC of 10 September 1984, was implemented in Portugal with the publication of the Advertising Code ("Código da Publicidade" - CP), made by Decree Law 330/90 of 23 October 1990, republished by Decree Law 275/98 of 9 September 1998, and more recently amended by Decree Law 332/2001 of 24 December 2001.

The regulatory authority for complaints on misleading advertising, including any other complaint relating to infringements to the CP is the Consumer's Institute ("Instituto do Consumidor" - IC), without prejudice to any other administrative or police authority.

The jurisdiction for the application of fines and penalties on infringements to the CP is attributed to a special Commission consisting of the following members: a judge appointed for such purpose; the President of the IC; and the President of the Institute for the Media ("Instituto da Comunicação Social" - ICS).

According to article 1 of the CP, the Advertising Code is applicable, in general terms, to any kind of advertising regardless of the respective mean or support used for advertising.

The CP's rules do not apply to political or parties' propaganda, which is subject to special regulation.

Law 31-A/98 of 14 July 1998 (TV Law) aims for the regulation of the TV activity and foresees that the regulatory body for this area is the ICS. For advertising issues the regulatory entity is the Consumer's Institute ("Instituto do Consumidor" - IC).

TV law attributes to the High Authority for the Mass Media (“Alta Autoridade para a Comunicação Social” - AACCS) a special jurisdiction on specific matters such as, access to TV broadcast, including licensing, programme freedom violation, rating age system, right of political broadcasting time (“direito de antena”), right of reply (“direito de resposta”) and right of political argument (“direito de réplica política”).

Article 21.5 of TV Law, refers that the concept of broadcast includes any elements of programmes, including advertising or extracts aiming to promote programmes. In addition, television advertising shall respect human dignity and shall not induce the practice of any crime, nor influence children or teenagers.

Articles 32 and 33 of TV law also contain special provisions regarding duration of advertising and tele shopping.

The jurisdiction regarding these matters is attributed to the same special Commission responsible for the application of fines and penalties on infringements to the CP.

The competences of the above-referred High Authority for the Mass Media (- AACCS) are defined in Law 43/98 of 6 August 1998. According to this Law the AACCS shall oversee that advertising campaigns conducted by the government or any public or administrative body are performed with impartiality.

The AACCS must also appreciate, by means of its own initiative or through a complain, any behaviour, which is likely to constitute the violation of any regulation applicable to the media (television, radio, press), in general.

2. Specific audiovisual regulation

a. Definitions

Articles 3 to 5 of the CP set forth some definitions used in advertising and advertising law principles. Thus, advertising, advertising activity, advertiser, professional, advertising agency, advertising vehicle and advertising receivers are defined in the CP.

These definitions exceed the definitions included in Directive 84/450/EEC. The CP states that announcement, for advertising purposes, may be made by any public or private undertaking (as defined in Directive 89/552/EEC).

It also states that the goal of advertising shall be, directly or indirectly, the commercialisation of any goods or services and the diffusion of any ideas or principles, initiatives or institutions.

Article 3 of the CP includes the general definition of advertising. Advertising, for this purpose, is defined as any form of communication made by a public or private undertaking in connection with trade, industrial activity, business, craft or profession in order to promote, directly or indirectly:

- a) the commercialisation of any goods or services;
- b) any ideas or principles, initiatives or institutions;

This article also extends the concept of advertising to any kind of communication issued by the Central Administration, in order to promote, directly or indirectly, the supply of goods and services.

For the purpose of this definition political propaganda is not considered as a form of advertising. Therefore, it is regulated by a separate legal regime.

Article 4 of the CP defines advertising activity. According to this article, advertising activity is the whole set of operations related to the transmission of an advertising message to the receivers. It also includes any legal and technical relations between advertisers, advertising professionals, advertising agencies and any entities, which use advertising vehicles or take part in advertising operations.

Article 5 defines advertiser, professional, advertising agency, advertising vehicle and advertising receivers. For the purpose of this article, it is defined as:

- a) Advertiser - any person or entity on behalf of whom advertising takes place;
- b) Professional or advertising agency – any person in the advertising activity or any entity in the advertising business;
- c) Advertising vehicle – means used for the transmission of the advertising message;
- d) Advertising receivers – any person or entity to whom the advertising message is, directly or indirectly, addressed.

b. General principles

The CP contains the general advertising principles. Article 6 of the CP states that advertising, in general, must be lawful, explicit, truthful and in accordance with the consumers rights.

According to the lawful principle (“princípio da licitude”), referred in article 7 of the CP, advertising shall not:

- a) be offensive to institutions, national or religious symbols, or historical personalities;
- b) induce violence or any illegal activity;
- c) prejudice human dignity;
- d) include any kind of discrimination on grounds of race, sex, religion, language or nationality;
- e) use people’s image or statements without permission;
- f) use obscene language or expressions;
- g) encourage behaviour prejudicial to the environment protection;
- h) include ideas of political or religious nature, as well as references to labour unions.

The lawful principle also states that the Portuguese language shall be used in advertising and that the use of foreign languages may be allowed in cases where the receivers are foreign people. However, a foreign language, exceptionally, may be used if necessary for the purpose of achieving the advertising goals.

The identification principle is set forth in article 8 of the CP. According to this article, advertising shall be readily recognizable as such, regardless of the means used as a vehicle for advertising. Television and radio advertising shall be kept separate from other programmes by means of a separating device introduced in the beginning and in the end of the respective spot.

Article 9 of the CP forbids hidden advertising or the use of any subliminal techniques, which may transmit an advertising message that is not clearly understood as such by its receivers. When transmitting any event in television or when using photographs, it is forbidden to focus directly any existing advertising.

Subliminal advertising is defined as a kind of advertising, which may cause in the receiver, without his realising, sensations, feelings or perceptions, regardless the technique.

The truthful principle is set forth in article 10 of the CP. According to this article advertising shall be truthful and shall not distort any facts. All statements regarding the

origin, nature, composition, properties and purchasing conditions of advertised goods or services shall be accurate and likely to be proved before any competent authority.

The misleading advertising prohibition is stated in article 11 of the CP, which is based on article 2.2 of Directive 84/450/EEC. According to article 11 of the CP, it is forbidden any advertising, which in any way, including its presentation and because of its misleading nature deceive, or is likely to deceive, the persons to whom it is addressed, regardless of any economic damage. Advertising, which is likely to injure a competitor, is also forbidden.

In order to determine whether advertising is misleading or not, account shall be taken of all its features, namely any information concerning (article 11.2 of the CP):

- a) the characteristics of goods or services, such as their availability, nature, execution, composition, method and date of manufacture or provision, fitness for purpose, uses, quantity, specification, geographic or commercial origin or the results to be expected from their use, or the results and material features of tests or checks carried out on the goods or services;
- b) the price or the way in which the price is determined, and how the goods are supplied or the services provided;
- c) the nature, attributes and advertisers rights, such as his identity and assets, his qualifications and ownership of industrial, commercial or intellectual property rights or his awards and distinctions;
- d) any rights and duties of those to whom advertising is addressed, as well as any guarantees.

The concept of misleading advertising is also applicable to advertisements, which lead to the idea of a promotion, prize or discount without any consideration, order or raffle.

As a general principle, article 11.4 of the CP states that the IC may ask the advertisers to make proof of the accuracy of any data contained in any advertisement. In case the advertiser is not capable, or willing, to make this proof such data will be considered as inaccurate.

Another general principle is set forth by article 12 of the CP. According to this article, advertising, which is not in accordance with the consumers rights, is forbidden.

The last general principle defined in the CP is the respect for the health and safety of the consumers. According to article 13 of the CP, advertising, which encourages behaviour prejudicial to health and safety of the consumers, namely resulting from the lack of information regarding the danger or harmfulness of the product itself or its use is

forbidden. Article 13.3 of the CP, refers that this must be specially accomplished in advertising addressed to children, teenagers, elderly and handicapped people.

c. Restrictions to distribute advertising

There are some restrictions in terms of distribution of advertising by the Portuguese public broadcaster RTP . , which are defined in the agreement on public service mission signed with the Government in December 1996. According to such agreement, public channel number 2 (“RTP 2”) is not allowed to transmit commercial advertising.

In terms of advertising, the concession agreement foresees that advertising in public service broadcaster’s channel RTP-1 must not exceed 7’30’’ per transmission hour.

Another restriction is set forth in Law 6/97 of 1 March 1997. Cable broadcasters may transmit the Parliamentary proceedings, however, no form of commercial advertising when transmitting those proceedings is allowed.

d. General rules on the content of TV advertising

Article 12 of Directive 89/552/EEC of 3 October 1989, was implemented in Portugal by article 7 of CP – the above described lawful principle.

Article 16 of the same Directive is also implemented in Portugal, by article 14 of the CP, which states that advertising specifically directed to minors, must always consider their psychological vulnerability, and, therefore, it shall not:

- a) Directly exhort minors to buy a product or a service by exploiting their inexperience or credulity;
- b) Directly encourage minors to persuade their parents or others to purchase the goods or services being advertised;
- c) Contain elements which might cause danger to minors’ psychical or moral integrity, as well as to their health or safety, namely through pornography scenes or through the encouragement of violence;
- d) Exploit the special trust minors place in parents, tutors or teachers.

Same article also defines that minors shall only be major participants in advertising messages in which a direct relation between them and the advertised product or service exists.

Other restrictions on the content of TV advertising, are inserted in articles 15 and 16 of the CP.

Testimonial advertising is set forth in article 15 of the CP. According to this article, testimonial advertising shall contain personalized, genuine and verifiable statements, related to the deponent experience or the experience of whom he represents. Impersonal testimony is allowed when it is not made by a specially qualified witness, namely when using uniforms of a specific profession.

Article 16 of the CP implements articles 2 and 3-A of Directive 84/450/CEE of 10 September 1984 as amended by Directive 97/55/EEC of 6 October, and defines comparative advertising as any advertising, which explicitly or by implication identifies a competitor, or goods or services offered by a competitor.

Article 16.6 of the CP defines the requirements comparative advertising shall meet, in order to be allowed:

- (a) it shall not be misleading according to Article 11 (misleading advertising);
- (b) it compares goods or services meeting the same needs or intended for the same purpose;
- (c) it objectively compares one or more material, relevant, verifiable and representative features of those goods and services, which may include price;
- (d) it does not create confusion in the market place between the advertiser and a competitor or between the advertiser's trade marks, trade names, other distinguishing marks, goods or services and those of a competitor;
- (e) it does not discredit or denigrate the trade marks, trade names, other distinguishing marks, goods, services, activities, or circumstances of a competitor;
- (f) for products with designation of origin, it relates in each case to products with the same designation;
- (g) it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products;
- (h) it does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name.

According to article 16, any comparison referring to a special offer shall indicate in a clear and unequivocal way the date on which the offer ends or, when appropriate, that the special offer is subject to the availability of the goods and services, and, when the special offer has not yet begun, the date of the start of the period during which the special price or other specific conditions shall apply.

The burden of proof of the accuracy of comparative advertising is borne by the advertisers.

e. Rules on duration of advertising and insertion in or between programmes

- identification principle

The CP foresees that television advertising must be clearly recognizable and separate from other programmes by an optical or acoustic sign in the beginning and the end of the advertisements' break. The separating device in the beginning of the advertisements' break is required to include the word "publicidade" ("advertising"), in such a way that it should be readily identifiable (article 8).

The CP also provides a specific rule concerning the prohibition of using subliminal images or any other dissimulating techniques, in order to ensure that the viewers distinguish advertisements from programmes. Whenever there is a television transmission of an event, the existing advertisement cannot be brought into focus. Besides that, the CP explains that subliminal advertising is achieved by any technical means and brings about feelings, of which the viewer is not aware (article 9).

The portuguese advertising self-regulatory body ICAP (Instituto Civil de Autodisciplina da Publicidade) has issued a Code of Advertising practice in 1991 (revised several times since then), which also refers to the identification principle. According to its article 21, advertisements should be easily distinguishable as such and separate from news or any editorial work.

The identification principle is considered to be one of the most important guidelines in both Portuguese advertising law and self-regulation. *In extremis*, it can be the key to solve difficulties arising from new advertising techniques: being a general principle applicable to all types of advertising, it should not ever be neglected.

To sum up with, Portuguese rules related to the identification principle tend to be more demanding than Directive TVWF, namely because the device, which separates advertisements from programmes, must have the word "advertising" written on.

- **insertion between programmes**

According to art. 25.1 of the CP, advertisements must be inserted between programmes. This general rule repeats almost literally the first sentence of art. 11.1 Directive TVWF. However, exceptions are admitted.

- **insertion during programmes**

Exceptionally, advertisements may be inserted during programmes, provided that their integrity and value, as well as, the rights of the rights holders are not prejudiced. In order to do so, programmes' natural breaks, duration and nature should be taken into account (article 25.2 of the CP).

There is no legal definition for “natural breaks” – its meaning must be found according to the particular circumstances, namely the above mentioned duration and nature of the programme.

In case of programmes consisting of autonomous parts, advertisements may only be inserted between these parts. In sports programmes and similarly structured events and performances containing intervals, advertisements' breaks may only occur in these intervals (art. 25.5 of the CP).

Concerning the transmission of audiovisual works such as feature films and films made for television (excluding series, serials, light entertainment programmes and documentaries), art. 25.7 of the CP, literally reproduces art. 11.3 Directive TVWF: “provided their programmed duration is more than 45 minutes, it may be interrupted once for each complete period of 45 minutes – a further interruption is allowed if their programmed duration is at least 20 minutes longer than two or more complete periods of 45 minutes”.

The CP provides the meaning of “programmed duration” of a programme: it consists in the extent of time of its effective transmission, excluding interruptions (advertising ones, and others) – art. 25.9.

Between two successive advertising breaks within the same programme (other than a programme consisting of autonomous parts or a sports programme) should elapse a period of at least 20 minutes (article 25.6 of the CP – cfr. art. 11.4 Directive TVWF).

In accordance with article 10.2 Directive TVWF, the CP states that the insertion of isolated advertising spots should remain the exception to the rule (article 25.8).

- **prohibition to insert advertising**

The CP foresees that advertising should not interrupt certain programmes. As stated in article 25.3/4, advertisements must not be inserted:

- during the transmission of a religious service;
- in news, political broadcasts, current affairs programmes, documentaries, religious programmes and children's programmes, when their programmed duration is less than 30 minutes (cfr. Art. 11.5 Directive TVWF).

- **duration**

The amount of advertising depends on the type of channel, as defined in the TV Law (article 32):

- it should not exceed 15% of the daily transmission time in free-to-air channels with national coverage . However, this percentage may be increased to 20% to include other forms of advertising or teleshopping messages;
- advertising or teleshopping messages should not exceed 10% of the daily transmission time in encoded channels with national coverage.;
- advertising should not exceed 10% of daily transmission time in teleshopping or self-promotion thematic channels.

The transmission time devoted to advertising and tele-shopping spots within a given one-hour period should not exceed 10% or 20%, depending on whether it is an encoded channel or not

This one-hour period of time is in general considered to be a fixed period of time starting every sharp hour.

Self-promotion spots are not submitted to the above referred limits stated in article 32 TV Law (cfr. article 18 Directive TVWF).

f. Surreptitious advertising

Portuguese regulation deals with surreptitious advertising in the chapter concerning general advertising principles..

B. Regulation for Specific Products

1. Alcohol

The regulation of alcoholic beverage advertising is set forth in the CP and in terms of self regulation there is a code of alcoholic beverages advertising practice (“Código de Autodisciplina na Comunicação Comercial das Bebidas Alcoólicas”).

Article 17 of the CP, as amended by Decree Law 332/2001 of 24 December 2001, establishes the general principles regarding alcoholic beverage advertising.

Thus, the advertising of alcoholic beverage, regardless of the advertising vehicle used for such purpose, is only permitted providing it complies with the following:

- a) It may not be aimed specifically at minors and, in particular, depict minors consuming these beverages;
- b) It does not encourage excessive consumption of alcohol;
- c) It does not despise the non-consumers of alcoholic beverages;
- d) It does not suggest any form of success, social success, or any special skill as a result of its consumption;
- e) It does not claim that alcohol beverages have therapeutic qualities or a stimulant or sedative effect;
- f) It does not link the consumption of alcohol to enhanced physical performance or to driving;
- g) It does not place emphasis on alcoholic content as being a positive quality of the beverage.

According to article 17.2 of the CP (recently amended by Decree Law 332/2001 of 24 December 2001) alcoholic beverage advertising on television (and radio) is expressly forbidden between 7.00 a.m. and 10.30 p.m..

New number 4 of same article 17 of the CP, forbids any association between alcoholic beverage advertising and any national symbols as identified in the Portuguese Constitution.

New numbers 5 and 6 of same article 17 of the CP, foresee that advertising of any events where minors participate, namely sports events, cultural activities or other, shall not make

any, direct or indirect, reference to alcoholic beverage brands. This restriction is also applicable to the locals where such events take place.

As mentioned above, in terms of self regulation for alcoholic beverage advertising, there is a code of alcoholic beverages advertising practice (“Código de Autodisciplina na Comunicação Comercial das Bebidas Alcoólicas” - CACCBA), adopted in July 2001.

The CACCBA was established within the alcoholic sector. For the purposes of the CACCBA, the alcoholic sector includes any activities related to the production, importation, distribution, and sale of alcoholic beverages.

Articles 1 and 2 of the CACCBA set forth, as general principles, that alcoholic beverage advertising shall avoid the inducement to any irresponsible consumption of alcoholic beverages.

In the same line as set forth in the CP, the CACCBA also has general references regarding alcoholic beverage advertising. Thus, it shall not despise the non-consumers of alcoholic beverages (articles 3 and 4 CACCBA). It shall not suggest any form of success, social success, or any special skill as a result of its consumption (article 5 of the CACCBA). It shall also not claim that alcohol has therapeutic qualities or that it has a stimulant or sedative effect or any other benefits resulting from its consumption (article 6 and 7 of the CACCBA). Moreover, alcoholic beverage advertising shall not suggest any recommendations made by medical professionals, except when made for pedagogic purposes.

Articles 9 to 13 of the CACCBA define the so-called vulnerable receivers. Thus, alcoholic beverage advertising shall respect pregnant women, minors, elderly and handicapped people.

Articles 14 to 17 of the CACCBA regulate the so-called high-risk situations that alcoholic beverage advertising must respect. These high-risk situations include any situations where safety is not respected including driving vehicles. It also refers to any positive inducement in terms of working or physical skills resulting from the consumption of alcoholic beverages.

Articles 18 to 20 of the CACCBA include the regulation of alcoholic beverage advertising in the media.

Article 18, states that in order to make the consumer take a responsible attitude towards the consumption of alcoholic beverages, any alcoholic beverage advertising in television must clearly mention the following statement: “BE RESPONSIBLE, DRINK WITH MODERATION”.

In addition to media advertising of alcoholic beverages, article 19 of the CACCBA, states that alcoholic beverage advertising shall not be used or transmitted immediately before, during breaks or immediately after any radio and television programmes especially aimed to minors.

2. Tobacco

Article 18 of the CP establishes the general regulation regarding tobacco advertising. According to this article, unless any other specific regulation states otherwise, all and any forms of advertising to tobacco, using any advertising vehicle under Portuguese jurisdiction, shall be prohibited.

In addition to this general regulation, Law 22/82 of 17 August 1982 regulates the prevention of tobaccoism and tobacco advertising.

According to article 2 of Law 22/82 any form of advertising to tobacco through any Portuguese, or Portuguese based, advertising media is forbidden. It is also forbidden to place names, brands or logos of any product containing tobacco in consumption goods not directly related to the use of tobacco.

Decree Law 226/83 of 27 May 1983 regulates Law 22/82. According to article 6 of Decree Law 226/83, it is understood as advertising, for this purpose, any divulgation aimed to attract the public attention in order to promote its acquisition.

Article 7 of Decree Law 226/83 states that in advertising actions, it is forbidden to place names, brands or logos of a tobacco based product in any consumption goods not directly related to the tobacco use.

An exception to the general principle of article 18 of the CP is set forth in Decree Law 52/87 of 30 January 1987. According to this Decree Law, advertising to tobacco is generally accepted in automobile sports events with international prestige. This includes, namely, sports events such as World and European cups and championships, formula 1, rallying, motorcycling, sport-cars and others. Advertising to tobacco is, therefore permitted through the placement of any name, brand or logo in the equipment or clothing of the intervenient in such events and in placards where such events take place.

According to Decree Law 178/2001 of 9 June 2001, the exceptional regime defined in Decree Law 52/87 regarding advertising to tobacco in automobile or motorcycling sports events will be in force until 31 December 2005.

3. Medicines

The regulation of medicines advertising is set forth in the CP. In terms of self regulation there is a code of advertising practices for pharmaceutical or medicinal products set forth by APIFARMA, which is the Portuguese Pharmaceutical Industry Association.

As a general regulation in terms of advertising, article 19 of the CP foresees that any advertisements for medical care treatment or medicines for human use available only on prescription are forbidden.

Decree Law 100/94 of 19 April 1994, as amended by Decree Law 170/98 of 25 June 1998 and by Decree Law 48/99, of 16 February 1999, which implemented Council Directive 92/28/EEC of 31 March 1992, regulates the advertising of medicines for human use.

According to the definition of medicines advertising set forth in article 2 of this Decree Law, medicines advertising is considered as a form of communication, information or incentive, which directly or indirectly, promotes its prescription, dispense, sale, acquisition or consumption. Thus, it is also directed to the advertising of medicine products in television with the restriction set forth in article 19 of the CP.

Article 3 of this Decree Law 100/94 establishes the general principles of advertising of medicines for human use. According to this article it is forbidden to advertise any medicines before the necessary authorisation for sale is granted.

This article establishes that advertising of medicines shall:

- a) Promote the rational use of medicines, by means of an objective use and without exaggerating their properties;
- b) Be conceived in such a way that the advertising message is expressed in clear terms, with the express indication of being a medicine;
- c) Not diverge from the resume containing the medicine characteristics as duly authorised for sale;
- d) Not be misleading.

In the same line as the general principle set forth in the CP, article 3.3 of Decree Law 100/94 foresees that medicines for human use available only on prescription may only be advertised in publications addressed to health professionals.

According to article 4 of Decree Law 100/94, the advertising of medicine products near the public, must contain the following information:

- a) Name of the medicine, as well as its most common designation, in case the medicine contains only one active substance;
- b) Therapeutic indications and special precautions;
- c) Essential information regarding the adequate use of such medicine;
- d) Advice to the user of said medicine that he shall read carefully the information contained in the pack and that, in case of any doubt, he must see a doctor.

Article 5 of the same Decree-Law establishes that Medicine advertising ~~medicine advertising~~ near the public in general shall not contain any indication which:

- a) Leads to the conclusion that medical advice or surgery is unnecessary, suggesting a certain diagnosis or any form of treatment by correspondence;
- b) Suggests that the medicine effects are guaranteed, with no side effects or with results better or comparable to other medicines;
- c) Suggests that any person's state of health will be improved by using such medicine;
- d) Suggests that any person's state of health may be jeopardised in case such medicine is not used, except in what concerns vaccine campaigns;
- e) Addresses to children;
- f) Makes reference to a recommendation produced by scientists, health professionals or a very well known person, inducing the consumption of medicines;
- g) Treats a medicine as an alimentary product, a cosmetic or any other consumption good;
- h) Suggests that the safety or efficiency of a medicine is owed to the fact that it is considered as a natural product;
- i) May induce to a false diagnosis;
- j) Refers in abusive, frightening or misleading terms to any demonstrations or cure guarantees;
- l) Refers in abusive, frightening or misleading terms to images showing changes in the human body caused by any disease or injury or action of a medicine;

m) Refers that the medicine was granted an authorisation for sale in the market.

Article 5.2 does not allow advertisements containing therapeutic indications, which may lead to self-medication in certain diseases, such as tuberculoses, STD, cancer, diabetes, etc.

Moreover, article 5.3 of Decree Law 100/94 foresees that all forms of comparative advertising of medicines are expressly forbidden.

Article 12 of Decree Law 100/94 created an entity specifically devoted to medicines advertising. This entity is known as national medicines advertising council (“Conselho Nacional de Publicidade de Medicamentos” - CNPM), and it is entrusted to the study of medicine advertising for human use. It also acts as consultation body for the Government in terms of advertising of medicines for human use.

The entity responsible for the supervision of advertising of medicines for human use is the national pharmaceutical and medicines institute (“Instituto Nacional da Farmácia e do Medicamento” - INFARMED).

As mentioned above, in terms of self-regulation there is a code of advertising practices for pharmaceutical or medicinal products set forth by APIFARMA, which is the Portuguese Pharmaceutical Industry Association.

This code of advertising practices for pharmaceutical or medicinal products (“Código Deontológico” – CD) was approved by APIFARMA on 5 June 1995.

As a general principle, the deontological rules inserted in the CD (which is applicable to medicinal products subject to prescription or used under supervision of a health care professional), shall not prejudice the compliance with the applicable regulations and legal provisions.

The CD establishes a number of principles applicable to the pharmaceutical industry, such as promotional criteria, scientific evidence, data on safety, disguised or misleading promotions, communications preceding the marketing authorisation, communications to the public and corporate procedures.

4. Cars

The general regulation concerning cars or vehicles advertising is set forth in article 22-A of the CP.

According to this article cars or vehicles advertising is forbidden when it:

- a) Contains any situation or suggestion for the use of a vehicle, which may risk the user's safety or any third parties safety;
- b) Contains any situation or suggestion for the use of a vehicle in such a way that may disturb the environment;
- c) Shows any situation of infraction to the Highway Code ("Código da Estrada"), namely suggesting exceeding the speed limits, using dangerous manoeuvres, the non-use of safety devices and the disrespect of any signals or foot travellers.

For the purpose of this article an automobile vehicle is considered as any mechanic traction vehicle capable of circulating by its own means in the public highways.

There are no other specific information duties concerning car advertising, apart from second-hand cars, which have a specific regulation but not related to television.

5. Media

There is no specific regulation nor self-regulation concerning media advertising or any other form of communication.

Thus, General advertising principles contained in the CP are applicable to all media (television, radio, press, outdoors, etc.), as well as its prohibitions and restrictions related to the content of advertisement spots.

6. Religions, politics and parties, social issues and groups.

There is no specific regulation, nor self-regulation, concerning religions, social issues and groups.

Thus, the general advertising principles contained in the CP are applicable, as well as its prohibitions and restrictions related to the content of advertisement spots.

As mentioned above, political advertising or any form of advertising related to parties is not considered as advertising and, therefore, the CP is not applicable. Political advertising or any form of advertising related to parties is subject to special regulation.

C. Self-Regulation

The most relevant self-regulation instrument is the Code of Advertising Practice ("Código de Conduta do ICAP" – CCICAP) established by the ICAP.

The ICAP is a Civil Institute to whom it is entrusted the self regulation in terms of advertising. It also has powers to make decisions related to its members (advertisers, advertising agencies and media, including tv broadcasters) including the application of several sanctions, e.g. admonition, suspension of membership, etc.

The CCICAP follows the ICC (International Chamber of Commerce) International Code of Advertising Practice (1997 edition).

The CCICAP establishes a few general principles such as:

- advertising must be legal, decent, honest and truthful;
- respect for human and social principles;
- comparative advertising;
- testimonial advertising;
- private life protection;
- prohibition of imitation of other advertisements;
- identification principle;
- concern with safety, health and minors;
- environment protection.

II. Tele-shopping

A. General regulation

1. General law on consumer protection containing rules on distance sale, applicable to all media

The Law on Consumer Protection, already referred to, contains rules, which apply to both advertising and tele-shopping.

Decree law 143/2001 implemented Directive 97/7/EC related to distance contracts. The rules are an exact reproduction of the Directive.

2. Specific audiovisual regulation

a) Definition

Teleshopping definition is provided in article 25-A.1 of the CP, according to which, teleshopping, for the purpose of the mentioned CP, is the broadcast of direct offers to the public, made by television channels, with a view to the supply of goods or services, including immovable property, rights and obligations, in return for payment.

b) authorization

Teleshopping is also regulated in TV law. Article 7.4 of TV Law states that thematic channels of self promotion and teleshopping shall not include any other elements of the conventional programming, such as news, sports transmissions, films, series or documentary programmes.

c) general rules on content

The above mentioned article 25-A.2 of the CP, states that, with the necessary adaptations and without prejudice of numbers 3 and 4, the advertising rules are applicable to teleshopping.

Article 25-A.3, prohibits medicinal products teleshopping, which is subject to a marketing authorization, as well as medical treatment teleshopping.

Article 25-A.4 states that teleshopping shall not encourage minors to buy or rent any goods or services.

d) rules on duration and insertion in and between programmes

Specific rules on duration of teleshopping transmissions and their insertion in TV programming are contained in articles 32 and 33 of the TV law.

Article 32.1 of TV Law, mentions that in national channels with non-restricted access, transmission time devoted to advertising messages shall not exceed 15% of the daily transmission time. Except when it includes other forms of advertising or teleshopping messages, in which case that limit may be increased to 20% of the daily transmission time.

Article 32.2 of TV Law states that, in national covering channels with restricted access, the transmission of advertising or teleshopping messages shall not exceed 10% of the daily transmission time.

Article 32.3 of TV Law states that in thematic channels of teleshopping or self promotion the transmission time devoted to advertising shall not exceed 10% of the daily transmission time.

Article 32.4 of TV Law states that the transmission time devoted to advertising and teleshopping messages, within a given one-hour period should not exceed 10% or 20%, depending on whether it is a restricted or a non-restricted access channel.

Article 32.5 of TV Law excludes from the above referred limits the informative messages transmitted by television broadcasters related to their own programmes and ancillary products directly derived from these programmes, as well as teleshopping windows (“blocos de televenda”) referred to in article 33.

Article 33.1 of TV Law mentions that national channels with non-restricted access shall transmit up to 8 teleshopping sets per day, since their overall duration does not exceed 3 hours, without prejudice to article 32.

Article 33.2 of TV Law states that teleshopping windows shall be of a minimum uninterrupted duration of 15 minutes.

Article 33.3 of TV Law prohibits the transmission of teleshopping windows in self promotion channels.

III. Sponsorship

A. General regulation

1. General law on consumer protection containing rules on sponsorship, applicable to all media

The Consumer Protection Law, already referred to, contains rules, which apply to both advertising and sponsorship at the same time. This fact is due to the definition of sponsorship.

2. Specific audiovisual regulation

a) Definition

Sponsorship means any contribution made by natural or legal people, not engaged in television broadcasting activities or in the production of audio-visual works, to the financing of any audio-visual works, programmes, reports, editions, sections (herein called programmes), regardless of the transmission means, with a view to promoting its name, its trade mark or image, as well as, its activities, products or services (article 24 of the CP).

It may be also relevant to mention that sponsorship is considered to be, by the CP, a special form of advertising (along with mail and house-to-house advertising).

b) General rules on content

The general principles stated in article 6 to 13 of the CP, and the basic rules on the prohibitions and restrictions of the content of the advertisements (including the regulation of specific products, such as alcohol, tobacco, etc. – article 14 to 22-B of the CP), apply - not only because they are the foundations of advertising law, but also because sponsorship is a form of advertising itself.

Apart from that, and being a special form of advertising, there are specific rules, such as:

- television programmes may not be sponsored by natural or legal people, whose main activity is related to the manufacturing or selling of tobacco or derived products;
- the news and political information programmes, both on television or radio, may not be sponsored;
- sponsored programmes must be clearly identified as such by the name and/or the logo of the sponsor in the beginning and the end of the programme;
- the content and scheduling of sponsored programmes may in no circumstances be influenced by the sponsor in such a way as to affect the responsibility and editorial independence of the broadcaster;
- sponsored programmes must not encourage the purchase or rental of the products or services of the sponsor or a third party, in particular by making specific promotional references to those products or services.

Cfr. article 24 of the CP and article 44 of Radio Law (Law 4/2001, of 23 February).

c) Rules on duration and insertion in and between programmes

As mentioned above, the name and/or logo of the sponsor must be clearly identified in the beginning and the end of any sponsored programmes.

Besides, the sponsor's name and/or logo may also be inserted during the programmes, according to the television rules on advertisement insertion (above explained article 25 of the CP - see I, A, 2. e, here-above).

There is no provision concerning duration of sponsorship activities or other detailed rules on the content of the message.

IV. Self-promotion

In terms of self-promotion the applicable rules are set forth in articles 7(6) and 32(5) of TV Law. According to article 7(6), self-promotion is considered as the advertising made by the television broadcaster concerning its own products, services, channels or programmes, this classification being of the competence of the AACS, under the terms of article 7(7).

Article 32(5) states that the transmission of informative messages by the broadcasters in connection with its own programmes and ancillary products directly derived from these programmes (as well as the blocks of teleshopping to which article 33 refers to) are excluded of the duration rules set in this article for advertising and teleshopping messages..

V. Other promotion techniques

a) Product placement

This way of presenting products and services is considered to be a special kind of advertising. There is no legal, nor conventional definition of product placement. Nevertheless, cases concerning product placement have already come up.

The special Commission responsible to the application of fines and penalties on infringements to the CP, understands that, product placement should be admitted within the same terms as sponsorship is. Meaning that product placement is allowed if it complies with the rules (above referred to) of sponsorship – article 24 of the CP and article 17 of Directive TVWF.

Relevant decisions taken by the special Commission and Court sentences, reveal that product placement is often considered illegal, namely because the purchase of the sponsor's products or services is encouraged (e.g. through specific promotional references to those products or services) and the sponsored programmes are not clearly identified as such. Both situations are not allowed according to the CP and Directive TVWF sponsorship rules. In spite of that, it is possible to use this technique in a legal way.

b) Co-production or co-financing with promotional intent

The CP does not foresee any regulation on co-produced or co-financed programmes. Notwithstanding general principles and rules on sponsorship should apply.

c) Merchandising

There is no specific national, nor self- regulation on merchandising. However, matters related to advertising are subject to the CP, so its general principles, as well as its prohibitions shall be applicable.

VI. New advertising techniques

a) Split screen technique

Split screen advertising technique consists the simultaneous broadcasting of editorial content and advertising content on the surface of a television screen (whether by the appearance of a window containing an advertising spot or simply by showing text advertising).

On one hand, there is no specific (projects of) regulation, nor decisions/guidelines of public authorities on this issue. However, in response to a questionnaire addressed in 2001 to several organisations by the Standing Committee of the European Convention on Transfrontier Television, the Portuguese Institute for the Media (ICS) has expressed his views towards this practice ⁽¹⁾. Briefly, the ICS has considered that split-screen advertising could not be allowed, at least at the current stage of regulation of tv advertising as established namely in the European Convention on Transfrontier Television and in the Television without Frontiers Directive. Such technique does not comply with the core principle established in the above mentioned international instruments concerning the need for a clear identification of advertising as such and, in particular, its separation from the other items of a programme service; additionally, in most cases such practice undoubtedly affects the integrity and value of the programmes.

On the other hand, national channels seldom use this technique. Nevertheless, broadcasters (mostly in news programmes) recently began to make use of this possibility, through the broadcasting of a programme and the parallel scrolling of text information at the bottom of the screen. However, there is no advertising component in these circumstances.

b) Interactive advertising

⁽¹⁾ Cf. “The New Advertising Practice of Split-Screen – Compilation of responses to a questionnaire on split-screen advertising from certain broadcasting regulatory bodies, professional associations and broadcasters”, (document distributed at the Expert Seminar on “The European Convention on Transfrontier Television in an Evolving Broadcasting Environment”, held in Strasbourg, 06.12.2001)

Interactive television is presently on trial in Portugal. There are only a few viewers (about 3000) and transmissions have had several difficulties. As a result of that, neither problems, nor corresponding decisions/guidelines related to interactive advertising have come up yet.

Again, no (projects of) regulation are known.

Interactive television raises problems beyond advertising. Firstly, it is not clear that interactive television is considered as “television”, taking into account its stated definition (art. 1.2 TV Law).

In fact, interactive television is based on a bi-directional communication act, whereas analogue television’s viewers are a passive audience, ie., they are considered as a whole and are unable to take initiative. The active role of the interactive television’s viewers must not be ignored. That is the reason why interactive television does not fit in the television’s definition, stated in TV Law.

In our opinion, if TV Law is not applicable to interactive television, then interactive advertising has not to comply with specific rules concerning the insertion of advertisements between/in programmes (article 25 of the CP), for they only apply to television advertising. However, the CP’s general principles must be obeyed, for all the identification principle, as well as rules on personal data protection set in Law 67/98, of 26 October 1998. Otherwise, interactive advertising would be illegal.

c) Virtual advertising

National regulation does not provide a definition of virtual advertising. However, it is commonly accepted that this technique is based on electronic systems, which replace/change/add the advertisements spots, by altering the broadcast signal. Virtual advertising creates unreal situations in existing scenarios, in such a way that they are taken for real. This technique enables sponsors and advertisers to reach a wider range of markets.

Both the special Commission and the Courts have already decided several cases related to virtual advertising. The question is being handled in the following terms:

- firstly, one must make sure that the so-called “virtual advertising” fits in the advertising definition stated in article 3 of the CP (usually it does, because advertising is such a wide notion: it includes any type of communication in order to promote products, services, etc.) ⁽²⁾;

⁽²⁾ However, it would be more accurate to qualify some cases as “virtual - or event - sponsorship”

- secondly, it is necessary to classify this sort of advertising: should a special form be adopted to name it, e.g., “virtual advertising”?;
- thirdly, if the two questions above shall have an affirmative answer “in casu”, some difficulties still remain:
 - whether related regulation exists and allows it, or not;
 - when should such type of advertising be considered as illegal?
- finally, it is advisable to verify whether this sort of advertising should be considered subliminal advertising, forbidden by article 9 of the CP.

In our point of view, although there are no autonomous provisions for virtual advertising, since it is a form of communication, which complies with the requirements of article 3 of the CP, it should obey the general principles of the CP, as well as its restrictions and prohibitions.

As a result of that, our belief is that virtual advertising would never be allowed according to the identification principle, namely the need of a suitable separating device. In fact, all the decisions concerning virtual advertising cases have come up to this conclusion: it is illegal because it violates article 8 and 25 of the CP.

Furthermore, because virtual advertising has the ability to lead viewers to believe unreal situations do exist, it may also be considered as surreptitious advertising, i.e., unconsciously assimilated, without viewers noticing its advertising intents.

To sum up with, virtual advertising would hardly be allowed - at least at the current stage of regulation of tv advertising.

RADIO

I. Advertising

A. General regulation

1. General law on consumer protection applicable to all media

The rules on advertising applicable to all media, and therefore to the radio as well, were already referred to in the beginning.

2. Specific audiovisual regulation

a) Definition

Article 2 of the Radio Law in force (Law 4/2001 of 23 February 2001) provides a definition of radio as: unilateral transmission of acoustic communications, by electromagnetic waves or by any other appropriate means, in order to be received by the listeners.

The definition of advertising is the same as mentioned above because it is regardless of its means of broadcasting.

b) Authorization

The High Authority for the Mass Media (AACS) licenses local, regional national and thematic radio stations. The licences are valid through a period of ten years, which is renewable.

The Portuguese Communications Institute (ICP) is responsible for verifying the technical requirements, while the Institute for the Media (ICS) keeps their registers, monitors and oversees sound broadcasting activities according to the law..

Both ICS and the Consumer Institute (IC) are liable for making sure that radio broadcastings comply with the advertising rules.

Parties, political associations, municipalities, trade unions, employers' or professional associations are not allowed to finance or own radio stations.

The Radio Law also foresees the authorization of digital radio, radio transmissions by satellite and by cable.

c) General rules on content

The content of advertising broadcast by the radio stations is subject to the same limitations as mentioned above in reference to television.

The general principles set forth in the CP are also applicable. Radio advertisements must be clearly identified, namely with an acoustic separating device. They must also be lawful, meaning in accordance with the constitutional basic values and general principles (on discrimination, environment protection, etc). Besides, radio advertisements spots must respect the consumers' rights.

The CP's prohibitions are also applicable. Radio advertising must not use subliminal techniques, nor be misleading (article 6 to 13 of the CP).

Finally, the content of the advertisements must be submitted to the already mentioned restrictions contained in articles 14, 15 and 16 of the CP, related to minors, testimonial and comparative advertising.

d) Rules on duration and insertion in and between programmes

Although radio advertising must comply with the identification principle, viz the required separating device in the beginning and the end of the advertisements break, it is subject to less severe rules on duration and insertion than television advertising.

Concerning the insertion of advertisements, article 44 of Radio Law only provides that the programmes' integrity should not be prejudiced. In order to achieve that goal, programmes' natural breaks, duration and nature should be taken into account.

With regard to the duration, the amount of advertising shall not exceed 20% of the daily transmission time.

Public service broadcaster (RDP) does not transmit any kind of commercial advertising. However, it broadcasts institutional advertising and self-promotion programmes.

B. Regulation for Specific Products

1. **Alcohol**
2. **Tobacco**
3. **Medicines**
4. **Cars**
5. **Media**
6. **Religions, politics and parties, social issues and groups.**

There are no specific rules for these products different from those mentioned above in reference to television. The prohibitions and the restrictions to advertisements spots related to such matters are considered general principles applicable to all means of communication.

C. **Self-Regulation**

No relevant self-regulation is known.

II. **Shopping**

There is no technique similar to tele shopping on radio.

However, if there should be, all the Code's general principles, as well as, prohibitions and restrictions (including specific rules on certain products, such as alcohol, tobacco) related to tele-shopping would apply. The rules on duration and insertion would also be analogously applicable.

A. **Self-Regulation**

No relevant self-regulation is known.

III. **Sponsorship**

1. **Specific audiovisual regulation**

a) **Definition**

The same as mentioned above in reference to television advertising.

b) **General rules on content**

The same as for television advertising (articles 24.1/ 3/ 5/6 of the CP).

Attention should be drawn to the rule, which does not allow news or any informative radio programme to be sponsored (article 44(3) of the Radio Law).

c) Rules on duration and insertion in and between programmes

The single rule related to this matter states that the sponsored radio programmes must be clearly identified as such by the name of the sponsor not only in the beginning, but also in the end of the programmes.

No rules exist on the duration.

A. Self-Regulation

No relevant self-regulation is known

CINEMA

There is no specific regulation for cinema advertising.

The general principles, namely the identification one, the basic prohibitions and restrictions (including those related to certain products, such as alcohol, tobacco, etc.) contained in the CP apply to all forms of advertisements. Therefore, they are also applicable to cinema advertising.

In our opinion the rules on insertion and duration of the advertisements spots on television may only be analogously applied to those on cinema as there is no specific regulation.

No self-regulation is known.

INTERNET

Neither specific regulation, nor self-regulation on advertising, sponsoring or sales offers exist.

Again, the general rules of the CP apply, because the Internet works like a means of communication, which can hold advertisements spots.

Besides this basic regulation, which is insufficient to solve all the problems arising from Internet advertising, there are the International Chamber of Commerce Guidelines on Advertising and Marketing on the Internet, dated from 2nd April 1998.

The ICC Guidelines refer to basic principles, such as: all advertising should be legal, decent, honest and truthful, as well as, sensitive to issues of social responsibility. Other rules on the disclosure of the advertisers' identity, the users' rights, namely concerning data, and the advertising to children are useful guidelines, which should be taken into account whenever an Internet advertising problem appears.

MOBILE TELEPHONY

Mobile phones are often used to carry advertising, which is usually associated to extra services, such as the weather forecast, the news, etc.

Neither specific regulation, nor self-regulation on mobile telephony advertising exists. The basic rules are, therefore, those contained in the CP.

However, Law 6/99 of 27 January 1999, foresees a special regulation applicable to telephone advertising. Besides the identification principle, any vocal, pre-recorded advertising messages by telephone are prohibited without permission of receivers..

In our opinion, this prohibition should also apply to mobile telephones. Although it does not apply to SMS messages.

Remark: Cinema, Internet and mobile telephony advertising problems are solved on a case to case basis and in accordance with the court's judgement. However, case law on these matters may not be referred to for they do apparently not exist.