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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
Fax 022 917 01 23
Geneva

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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>

(a) when it is necessary to protect the vital interests of the data subject or of another person where the data subject is physically or legally incapable of giving his consent;

(b) when it is carried out with the data subject's consent in the course of its legitimate activities by a foundation, association or non-profit seeking body with a political, philosophical, religious or trade union aim and on condition that the processing relates solely to the members of the body or to persons who have regular contact with it in connection with its purposes and that the data are not disclosed to a third party without the consent of the data subjects;

(c) when it relates to data which are manifestly made public by the data subject, provided his consent for their processing can be clearly inferred from his declarations;

(d) when it is necessary for the establishment, exercise or defense of legal claims and is exclusively carried out for that purpose.

4 - The processing of data relating to health and sex life, including genetic data, shall be permitted if it is necessary for the purposes of preventive medicine, medical diagnosis, the provision of care or treatment or the management of health-care services, provided those data are processed by a health professional bound by professional secrecy or by another person also subject to an equivalent obligation of secrecy and are notified to the CNPD under article 27, and where suitable safeguards are provided.

8. Does your country have regulations on marketing research standards? How is this sector regulated in particular for marketing research involving human beings?

Data protection and consumer legislation define some standards for marketing research. It should be noted that Portugal has incorporated in national legislation E.U. Directives concerning data protection and consumer protection. This sector is regulated by the Direção-Geral do Consumidor (Directorate General for the Consumer) and it is self-regulated by several entities such as APODEMO – Associação Portuguesa de Empresas de Estudos de Mercado e de Opinião (Portuguese Association of Market and Opinion Research Companies) and AMD – Associação Portuguesa De Marketing Directo (Portuguese Association of Direct Marketing).⁶

9. Please describe rules regulating outdoor advertising including the use of billboards or screens in your country. Have enforcement mechanisms been established in this respect? Please indicate whether other forms of communication, such as public interest messages and artistic creation, can also be displayed outdoors, including on billboards and screens, and how there are regulated.

Outdoor advertising obeys to the rules and legislation generally applied to the advertising and also to specific regulation. The Law 97/88, of 17th August rules:

Article 1 – Outdoor advertising

1 - The posting of advertisements or registration of a commercial nature obeys the general rules on advertising and depends on prior licensing by the competent authorities.

⁶ The Code of self-regulation of the members of APODEMO can be accessed here: <http://www.apodemo.pt/codigo.htm> (in Portuguese).

2 - Without prejudice to any intervention required from other entities, the municipalities are incumbent of the safeguard of the urban and environmental balance, and of the definition of licensing criteria applicable in the respective municipality area.

Article 2 - Licensing system

1 - The permit application is addressed to the Mayor of the respective area.

2 - The decision of the municipal council should be preceded by an opinion of entities with jurisdiction over the place where the advertising is affixed, including the Portuguese Institute of Cultural Heritage, the Autonomous Junta of the Roads, the Directorate General of Land Transport, Directorate-general of Tourism and the National Parks Service, Reserves and Nature Conservation.⁷

3 - In the autonomous regions, the mentioned in the preceding paragraph shall be issued by the respective regional offices.

Article 3 - Propaganda

1 - The display or listing of advertising messages is guaranteed in the area of each municipality in the public spaces and places defined for the purpose by the municipal councils.

2 - The display or listing of propaganda messages in places or areas of private property depend on the consent of the owner and it must respect the existing rules on protection of architectural heritage and urban, environmental and scenic environment.

Article 4 - Licensing criteria and exercise

1 - The criteria to establish the licensing of commercial advertising and propaganda should pursue the following objectives:

- a) Not cause the obstruction of panoramic outlook or affect the aesthetics or the environment of places or landscape;
- b) Do not harm the beauty or the framing of national monuments, buildings or other public interest likely to be classified by government entities;
- c) Not to cause harm to others;
- d) Not affect the safety of persons or things, especially on road or rail traffic;
- e) Not present displacements, shapes or colors that may be confused with traffic signals;
- f) Not hamper the movement of pedestrians, particularly the handicapped.

2 - The use in any case of non-biodegradable materials in the display of advertising messages and propaganda is prohibited.

⁷ Due to several administrative reforms the Authorities mentioned in this law presently hold different names/designations.

- 3 - It is prohibited in any case the realization of inscriptions or murals on national monuments, religious buildings, headquarters of national sovereignty entities or autonomous regions or municipalities, such as traffic signs, road signs, inside any offices or public buildings or franchisees to the public, including commercial establishments and historical centers declared as such under the relevant planning regulations.

Article 5 - Cumulative licensing

1 - If posting or listing of forms of advertising and propaganda requires the execution of civil works subject to license, this has to be achieved cumulatively under applicable law.

2 - Local councils, once the offender is notified, are competent to order the removal of advertising messages or propaganda and to impound or demolish works when it is contrary to the provisions of this law.

Article 6 - Removable media advertising

1 - Removable media propaganda posted in public places must respect the rules defined in Article 4, and the entities that have installed it are responsible for the removal.

2 - Municipal councils, once the parties have been heard, are incumbent of setting the terms and conditions of the removal of advertising media used.

Decree-Law 105/98, of 24th of April 1998, that regulates the advertising in the surroundings of national roads, rules that:

Article 3 - Prohibition

1 - It is forbidden to display advertising outside urban areas in any locations where it is visible from national roads.

2 - The prohibition referred to in the preceding paragraph covers the maintenance and installation of the advertising holders.

3 - Licenses issued in violation of the preceding paragraph are null and void, being the issuing entities civilly liable for damages arising therefrom for individuals in good faith.

Article 4 - Exceptions

The prohibition foreseen in paragraph 1 of the precedent article does not cover:

a) The means of advertising that are designed to identify buildings or establishments, public or individuals, provided that such advertising is displayed in those buildings or establishments;

b) Temporary advertising to rental or sale of property, when located on the property to be sold or rented;

c) The means of advertising of cultural interest;

d) The means of advertising of touristic interest recognized as such under the Regulatory Decree No 22/98 of 21 September 1998.

The rules above described are enforced by fines and other mechanisms.

10. Does national legislation regulate advertising, sponsoring and commercial practices in public and private schools (including on school buses and within the schools immediate surroundings)? Do companies engaging in sponsorship of schools enjoy a tax deduction?

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 advertising alcoholic beverages, tobacco or any kind of pornographic material in schools, as well as in any publications, programs or activities specially designed for children.

It is also important to note that general rules on advertising, such as the ones contained on the Advertising Code, also apply to advertising in schools, specially 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.

11. Does national legislation regulate advertising in Universities as well as cooperation between research institutes / universities and business, in particular regarding research sponsorship?

No, there is no national legislation specifically regulating advertising in Universities and cooperation between research institutes/universities and business or research sponsorship.

12. Are there specific measures such as inter alia, tax incentives to encourage private sponsorship of artistic creation? Please provide a brief description of these measures. Is the private sponsorship for cultural institutions receiving public funding regulated and if so please provide details. Do such regulations also apply to monuments and national heritage buildings?

Yes, there are tax incentives to encourage private sponsorship of artistic creation. In the Decree-Law No. 215/89 of 1st July (amended by Decree-Law No. 108/2008 of 26th June), Article 61 (Chapter X - Tax Benefits section) rules that "donations in cash or in kind, granted without reimbursement obligations (...) to public or private entities whose business is predominantly carrying out initiatives in the social, cultural, environmental, educational or sports areas" benefit from tax deduction relating to patronage.

Tax benefits relating to patronage differ depending upon whether the donations are destined to public or private entities by corporations or individual citizens.

- i) Donations to public entities: if the patron is a corporate entity, in tax terms, the donations are entirely accepted as costs, increased by 20%. Donations to public bodies which promote relevant projects in areas such as theater, music, opera and ballet, benefit from an increase of 40%. For individual taxpayers, donations can be deducted to the levy by 25%;
- ii) Donations to private entities: If the patron is a corporate entity, the donations increased by 20% are accepted as costs up to a limit of 6/1000 of sales and/or services rendered. Donations from individuals to private entities allow a deduction in the collection corresponding to 25% of the total, up to 15% of the levy.