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Advertising & Marketing

Portugal

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Law and Practice

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1. Legal/Regulatory Framework

1.1 Source of Regulations

Primary Law

In Portugal, advertising practices are not governed solely by any one comprehensive law.

Nonetheless, the primary law applicable to advertising, irrespective of the sector and channels of communication in question, is the Advertising Code (Decree-Law 330/90, as amended), while the Law on Unfair Commercial Practices (Decree-Law 57/2008, as amended) aims to protect consumers, competitors and other market stakeholders from unfair commercial practices, including from misleading and false advertising.

Specific Legislation

There is a variety of sector-specific legislation posing additional restrictions on the advertising and marketing of certain products and services or to the use of specific channels of communication. Please refer to **1.6 Regulated Industries** for additional information.

Self-Regulation

Supervisory authorities, self-regulatory organisations and sectoral business associations have published codes of conduct, guidelines, and recommendations. The binding nature of these documents depends on the issuing organisation. Please refer to **1.2 Regulatory Authorities**, **1.4 Self-Regulation** and **1.6 Regulated Industries** for additional information.

1.2 Regulatory Authorities

Under the Portuguese legal regime, the enforcement of the various laws and regulations governing advertising is carried out by different competent authorities, which are free to exercise their powers independently. The main regulatory authorities competent to enforce the laws and regulations governing advertising practices are discussed below.

DGC

The Directorate General for the Consumer (*Direção Geral do Consumidor* – DGC) is the authority responsible for the elaboration, definition and execution of advertising policies, monitoring compliance with the provisions of the Advertising Code and for enforcing any violation of such provisions, as well as addressing any complaints received.

In this context, the DGC may:

- issue fines provided for in the Advertising Code;
- hold market players accountable for infringements of the Advertising Code, namely by ordering precautionary measures regarding the suspension, termination or prohibition of

illicit advertising communications, misleading advertising, unlawful comparative advertising or any advertising which may pose a risk to consumers; and/or

- be called on to intervene, by any professional or competitor with a legitimate interest, regarding misleading advertising and to ensure compliance with the provisions on comparative advertising.

ASAE

The Food and Economic Security Authority (*Autoridade de Segurança Alimentar e Económica* – ASAE) is responsible for monitoring compliance with the provisions of the Law on Unfair Commercial Practices and for enforcing any violations of such provisions, namely through inspection and prevention.

ASAE co-ordinates with similar entities at a European and international level.

Complaints regarding infringements of the Law on Unfair Commercial Practices that have an impact on consumers' rights may be filed through ASAE's electronic complaint system. ASAE may then assess the complaints internally or forward them to another competent authority.

ASAE may also issue fines as a consequence of such infringements or impose restrictions on the commercial practices undertaken by advertisers and advertising entities.

Note that other regulatory authorities in specific industries – such as in healthcare, financial services, and gambling – are competent to enforce advertising laws and regulations in their specific sectors.

1.3 Scope of Liability

According to the Advertising Code, advertisers (ie, the entities on behalf of whom the marketing communication is conveyed), advertising professionals (ie, the natural person who practises advertising activities), advertising agencies (ie, the legal person whose exclusive object is the exercise of advertising activities) or any other entity that carries out advertising activities, as well as holders of the advertising medium or the respective concessionaire, may be held individually or jointly liable, if they are in some way liable, for deceptive advertising and for the damages caused to third parties as a result of the dissemination of illicit advertising.

Administrative fines may be also posed to the stakeholders mentioned above, varying between EUR1,750 and EUR45,000 depending on the specific infringement.

Moreover, accessory sanctions may apply, such as:

- the seizure of objects used in the exercise of the infringement;
- a temporary ban, up to a maximum of two years, from the advertising activity;
- deprivation of the right to subsidy or benefit granted by public entities or services; and/or
- temporary closure of the premises or establishments where the advertising activity is carried out, as well as cancellation of licences or permits.

Note that other levels of liability may derive from specific sectorial legislation, for instance concerning advertising for health-care or financial services or products through TV, radio, etc.

Individual Owners and Shareholders of a Company

In relation to the liability of individual owners and shareholders of a company, and depending on the company's corporate type and the specific infringing act, Company Law establishes that individual owners of an organisation may be found supplementarily liable, together with the company.

Moreover, directors are liable towards the company, shareholders and third parties for the damages they may have directly caused while exercising their functions, and as a rule, shareholders do not share the directors' liability.

1.4 Self-Regulation

The Portuguese Self-Regulatory Organisation for Advertising (*Auto Regulação Publicitária* – ARP) is a non-profit private body responsible for implementing a self-regulatory system seeking to maintain lawful and truthful advertising practices.

The members of the organisation are advertising agencies, private companies, brands and sectorial associations that join on a voluntary basis.

The organisation is comprised of a regulatory council, an ethics jury, a technical-legal office and a conflict resolution system.

The ARP's responsibilities are set out below.

Creating Codes of Conduct

The regulatory council, either on its own initiative or at the request of an interested party, may adopt codes of conduct and guidelines designing advertising standards and good practices.

The ARP has issued the following codes/guides:

- Code of conduct on advertising and other forms of commercial communications.

- Code for commercial communications regarding alcoholic beverages – wines and spirits.
- Code for commercial communications regarding food and beverages directly offered to children.
- Good practice guide for digital marketing communications and behavioural publicity online.

Issuing Deliberations/Decisions

On its own initiative, or at the request of an interested party (as part of its conflict resolution system), the ARP's ethics jury may take binding decisions for the parties involved in the dispute. The ARP may mandate the immediate termination of an unlawful advertising communication or request that the advertiser involved perform certain communications, clarifications or statements regarding the respective advertising practices.

The ARP may also publish legal and technical opinions, directives and recommendations, which are only binding for the members of the ARP.

Pre-clearance and Conflict Mediation

The ARP carries out pre-clearance and monitoring of the advertising messages of its members; as well as mediating conflicts and assessing complaints. It does this through its dispute resolution system, as well as assessing complaints filed to the ethics jury by civil society, market stakeholders, private and public entities.

1.5 Private Right of Action

In Portugal, consumers/private citizens may challenge advertising practices through a variety of means.

Right to an Injunction

Under the Portuguese Consumer Law (Decree-Law 24/96 of July 31st, as amended), directly affected consumers have the right to obtain an injunction aimed at preventing, correcting or ceasing practices harmful to consumer rights, which, among others:

- threaten consumers' health and physical safety;
- entail the use of prohibited general clauses; or
- consist of commercial practices expressly prohibited by law, namely unfair commercial practices.

Actions aimed at obtaining an injunction may also be brought by:

- consumers and consumer associations, although not directly affected, in certain circumstances determined in the Law on Class Action (Law 83/95 of August 31st, as amended);
- the Public Prosecutor's Office or the DGC, when the subject matter involves homogeneous individual interests, collective or diffuse interests; and

- any person, including competitors, with a legitimate interest in contesting prohibited unfair commercial practices.

The causes of action in lawsuits aimed at obtaining an injunction correspond to violations of the prohibitions against the unlawful commercial practices in question. Remedies include injunctive orders as well as their publication. The court may additionally determine a compulsory pecuniary sanction for failure to comply with an injunctive order.

Compensation

Consumers affected by unfair commercial practices or by unlawful advertising messages are entitled to compensation for damages under general civil liability terms.

Compensatory redress is also allowed in collective actions. Pursuant to the Portuguese Constitution, everyone, either individually or through associations for the defence of the interests in question, shall be granted the right to a class action on the conditions determined by law, including the right to request compensation for the injured party or parties, in particular aiming at promoting the prevention, cessation or judicial prosecution of offences against consumer rights (among others).

Interim Measures

Any person with a legitimate interest in contesting prohibited unfair commercial practices regarding advertising may submit the matter to the DGC which may order interim measures of temporary cessation of the unfair commercial practice or prohibit an imminent unfair commercial practice in advance.

Class Actions

Although consumers are only provided with injunctive class mechanisms regarding consumer litigation in the current EU legal framework, Portuguese law establishes that consumers, either individually or through an association that protects legitimate and collective interests, have the right to bring a class action that seeks not only the prevention and termination of an infringement, or the continuation of its effects, but also compensation for damages caused to injured parties. However, these class actions are not common in the Portuguese legal system.

1.6 Regulated Industries

Specific Regulation

In Portugal, certain industries are subject to sector-specific laws enforced by the respective competent authorities. Among others, this is the case in the healthcare, financial services or products, gambling, legal, food, TV, radio and cosmetics sectors. Similarly, specific advertising activities are subject to additional rules, such as:

- posting and registration of advertising messages (Law 97/88 of August 17th, as amended);
- home advertising by telephone and fax (Law 6/99 of January 27th);
- advertising of audiotext services (Decree-Law 175/99 of May 21st, as amended);
- radio advertisement (specific provision in Radio Law - Law 54/2010 of February 23rd, as amended);
- TV advertising (specific provisions in TV Law – Law 27/2007 of July 30th, as amended);
- advertisement of consumer credit agreements for residential properties (specific provisions in Decree-Law 74-A/2017 of June 23rd, as amended); and
- institutional advertising of the State (Law 95/2015 of August 17th, as amended).

Regulated Products or Services

Furthermore, the Advertising Code, together with specific applicable legislation, imposes special rules on specific products, services or activities. These include, among others:

- alcoholic beverages;
- tobacco;
- treatments, health and medicines;
- advertising in educational establishments or publicity aimed at minors;
- products containing high energy value, salt content, sugar, saturated fatty acids and processed fatty acids;
- games, gambling and bets;
- academic or professional courses (education);
- motor vehicles;
- “miraculous” products and services (vis-à-vis puffery);
- sponsorship;
- the Self-Regulatory Code of Beer Companies for Commercial Communications;
- the Self-Regulatory Code of Commercial Communications on Alcoholic Beverages Matters – wines and Spirits; and
- the Self-Regulatory Code Regarding Commercial Communications on Food and Beverages Directed to Children.

Legal and Regulatory Trends

In the last 12 months, the ARP has issued, among others, three major decisions in which the termination of the respective illegal advertising practices was ordered:

- A case regarding the advertisement of household cleaning products, where the ARP decided that the advertiser violated the principle of accuracy and truthfulness, as well as the obligation to prove its advertising claims on the quality of the product.
- A case regarding the advertisement of healthcare products, where the ARP decided that the advertiser infringed

the principle of accuracy and truthfulness, as well as the Medicines Statute (Decree-Law 176/2006, as amended) and fair competition rules by qualifying its product as providing “relief of flu and congestion symptoms, with an effect within 15 minutes and lasting for up to 6 hours”, associated with the age of a stopwatch marking 15 minutes.

- A case regarding an advertisement in the automotive industry, in which the ARP decided that the advertiser violated the principle of accuracy and truthfulness, as well as the obligation to prove its advertising claims on the carbon dioxide emissions of an electric vehicle, which deceived consumers into believing that purchasing the vehicle would exempt them from paying emission-related taxes.

2. Advertising Claims

2.1 General Standards

Advertising Code

The Advertising Code identifies the following as general criteria to assess whether an advertising practice is deceptive or misleading:

- Lawfulness – advertising is subject to the general prohibition of unlawfulness, an advertising communication that by its form, object or purpose, offends constitutionally established fundamental values, principles and institutions is unlawful; namely, advertising that encourages violence, as well as any illegal or criminal activity, and/or that hinders the dignity of people or any fundamental rights.
- Identification – advertising must be unambiguously identified as such, irrespective of the channels of communication used.
- Accuracy – statements about the origin, nature, composition, properties and commercial conditions of the advertised goods or services must be accurate and subject to proof before the competent authorities when necessary.
- Respect for the rights, health and safety of the consumer – advertising must not encourage behaviours harmful to the health and safety of the consumer, namely due to insufficient information about the product’s dangers or by the depiction of dangerous scenarios in advertising communications.

Law on Unfair Commercial Practices

The Advertising Code directly refers to the Law on Unfair Commercial Practices for the qualification of advertising claims as deceptive or misleading.

Deceptive or misleading advertising is defined as those advertising communications that distort, or are likely to substantially distort, the purchasing behaviour of the consumer.

Moreover, the law refers to specific categories of deceptive advertising:

- Misleading actions – advertising with false information or information that despite being factually correct misleads or is likely to mislead the consumer, leading them to a purchasing decision that may not be properly justified; information capable of misleading the consumer may involve the main characteristics of the relevant good or service, such as its availability, price, the method of calculating the price or the existence of a specific advantage over the price.
- Misleading practices considered deceptive under any circumstances – such as falsely affirming to be a signatory to a code of conduct, or displaying a certification mark, a quality mark or any equivalent without having obtained the necessary authorisations; similarly, claiming that the good or service can increase the chances of winning in games of chance or falsely claiming that the good or service is capable of curing diseases, dysfunctions and malformations (ie, puffery).
- Misleading omissions – omitting material information instrumental to an informed purchasing decision; hiding or presenting that information in an unclear, unintelligible or untimely manner; or not mentioning the commercial intention of the communication, if it cannot be inferred from the advertising context.
- Aggressive commercial practices – commercial practices that use harassment, coercion or undue influence that limit or are likely to significantly limit consumers’ freedom of choice or behaviour in relation to a good or service, leading the consumer to a purchasing decision that they would not otherwise have made.
- Commercial practices considered aggressive under any circumstances – such as contacting the consumer through home visits, ignoring their request for the professional to leave or not to return or making persistent and unsolicited requests, by telephone, fax, e-mail or any other means of remote communication, except in circumstances, and insofar as this is justified, for the fulfilment of a contractual obligation.

2.2 Actionable Advertising Claims

Regulation of Implied Claims

The Advertising Code and the Law on Unfair Commercial Practices are applicable to any form of advertising practice. Therefore, both express and implied claims are regulated.

The principle of identification mandates that advertising must be unambiguously identified as such. Thus, the use of indirect, implicit, implied, subliminal, hidden or covert advertising claims – such as subliminal images or other deceptive means – are prohibited. Subliminal advertising is defined as advertis-

ing that, using any technique, may provoke sensory perceptions without the recipient being aware of them.

Concomitantly, the principles of accuracy and respect for the rights, health, and safety of the consumer prohibit ambiguous advertising claims or inaccurate product or service descriptions.

Moreover, puffery is regulated by the Law on Unfair Commercial Practices and is considered misleading under any circumstances (see **2.1 General Standards**). Similarly, claims that are too broad, speculative or that cannot be objectively measured or proved by the advertiser are considered deceptive.

Proof of Claims

Regulatory authorities have the power to request that advertisers provide proof of their claims. The means used to prove the accuracy of the claims are not specified in the Advertising Code and it is at the discretion of the advertiser to provide the necessary material evidence. Nonetheless, scientific support of the advertising claims may be required by sector-specific laws and regulations, such as healthcare (see **2.4 Testing** and **2.5 Clinical Studies**). If evidence is not presented or is insufficient, the claim shall be considered inaccurate.

2.3 Claim Substantiation

All advertising claims must be proved (see **2.2 Actionable Advertising Claims**) and statements regarding the origin, nature, composition and properties of the advertised goods or services must always be accurate and truthful.

Generally, official certification procedures – as well as technical reports, studies or facts that assert certain product or service characteristics – are usually given as proof. Nonetheless, the type of substantiation required may differ according to the type of communication, the nature of the claim or of the product or service (see **2.4 Testing** and **2.5 Clinical Studies**). For instance, testimonial-based advertising requires a personalised statement that is both genuine and verifiable, based on the experience of the provider of the testimonial.

Additionally, certain sector or product-specific claims may be contingent on national and international standards officially recognised by competent associations, authorities or entities via international or national certification procedures and other kinds of endorsements, such as technical opinions, decisions or quality seals (see **2.6 Regulated Claims**).

2.4 Testing

Portuguese law does not establish generally applicable standards for the testing of products with the view of supporting advertising claims, other than the principle of accuracy under the Advertising Code.

There are, however, specific standards applicable to the advertising of certain types of products, which apply together with the general criteria of the Advertising Code.

Cosmetic Products

These are regulated by Regulation (EC) No 1223/2009 as well as Commission Regulation (EU) No 655/2013. The common criteria for the justification of claims used in relation to cosmetic products is further substantiated by the Technical Document on cosmetic claims elaborated by the European Commission. These documents establish the rules applicable to the support of advertising claims made in relation to cosmetic products, providing the appropriate guidelines for a correct interpretation of the standards of substantiation, including testing.

Biocidal Products

These are governed by Regulation (EU) No 528/2012. Article 72 of this regulation is paramount as the Portuguese law executing Regulation 528/2012 (Decree-Law 140/2017, of November 10th), refers to this Article as the rule governing the advertisement of biocides. Notwithstanding this, no specific rules are fixed by Regulation 528/2012 for the testing of products with a view to substantiating advertising claims.

Food Products Containing Nutritional and Health Claims

These are governed by Regulation (EC) No 1924/2006. In fact, despite Article 6 of this Regulation, which governs the scientific substantiation of claims, determining (i) that “Nutrition and health claims shall be based on and substantiated by generally accepted scientific evidence”, and (ii) that economic operators may have to justify such claims, no specific provision addresses the standard of testing in the Regulation nor does Portuguese Law establish such a standard.

2.5 Clinical Studies

Considering the answer provided in **2.4 Testing**, no human clinical studies are required for certain types of advertising claims.

Nonetheless, special standards apply to cosmetic products, as defined under Annex II of the Technical Document on cosmetic claims on the “Best practice for claim substantiation evidence”. As such, certain claims – such as “tolerance tested”, “dermatologically tested”, “tested under medical supervision”, “clinically tested”, etc – must be substantiated by clinical studies. These clinical studies must comprise reliable and reproducible methods appropriate to ground the claim at hand. Study protocols must be drawn up and validated in order to enable the study to be conducted and monitored appropriately, ensuring its quality. These studies must be conducted on the target population, where necessary, and be defined by strict inclusion/exclusion criteria.

Moreover, clinical studies of whatever nature must be conducted by a person with the appropriate qualifications, who has training and experience in the field of the proposed study and who has high ethical standards and professional integrity. In addition, the facilities in which tests are conducted should maintain a quality assurance system, including standardised operating procedures. Finally, data processing and the interpretation of results should be fair and should not overstep the limits of the test's significance; for this reason, data recording, transformation and representation should not be designed to overstate the effect(s) measured.

A report should be prepared which includes clear identification of the product, enabling establishment of a link to the product available on the market. This report should also include the study's objective, test schedule and test protocol, presentation of results and their interpretation, statistics, and signature of the person in charge of the study.

2.6 Regulated Claims

There are specific claims that are subject to specific rules or regulations, especially in relation to food, such as:

- Regulation (EU) 1169/2011, concerning food information to consumers, establishes general principles, requirements and responsibilities governing food information, and particularly food labelling; and
- Decree-Law 118/2015 (implementing Directive 2002/46/EC), establishes rules for the labelling of dietary supplements, introducing specific rules on vitamins and minerals (specifically, in relation to nutritional supplements' labels, the technical labelling office of the Portuguese Association of Food Supplements (APARD) may verify and technically review products' functional and nutritional characteristics and certify its label); and
- Regulation (EU) No 1151/2012, which regulates the protected designations of origin, protected geographical indications and traditional specialties, as well as Decree-Law 61/2020 addressing the use of protected geographical indications for wine.

The Portuguese Directorate-General of Agriculture and Rural Development is responsible for co-ordinating the procedure for providing such indicators together with other authorities such as ASAE.

3. Comparative Advertising

3.1 General Requirements

In Portugal, comparative advertising is permissible as long as the rights of the consumer are respected and the advertising

activities in question do not constitute unfair commercial practices or deceptive advertisement.

Lawful comparative advertising claims must refer to essential, representative, and objectively verifiable characteristics of the goods or services being compared. This comparison must be directed at goods or services of the same kind, serving the same needs and objectives.

It is possible to identify a competitor by name, both directly and indirectly, as long as this practice does not constitute unfair competition, namely where:

- the comparison is objective and fair;
- the messages do not create confusion between the compared brands/companies nor about the origin of the product or service; and
- the advertising does not disparage the image, products, services or reputation of the targeted competitors nor does it intend to benefit from their name, brand, credit or reputation.

3.2 Comparative Advertising Standards

Please refer to **3.1 General Requirements** regarding the additional standards applicable to comparative advertising.

This tighter control of comparative advertising claims aims to ensure consumer and market protection as well as fair competition between the market players.

3.3 Challenging Advertising Claims

Comparative advertising is subject to general advertising standards as well as to the specific rules outlined in **3.1 General Requirements**. Please refer to **2.2 Actionable Advertising Claims** regarding the general standards applicable to determine the truthfulness of comparative advertising.

3.4 Challenging Comparative Claims

Competitors with a legitimate interest in opposing misleading advertising and/or ensuring compliance with the provisions applicable to comparative advertising may file a complaint with the DGC (see **1.2 Regulatory Authorities** and **1.5 Private Right of Action**) and, most commonly, with the ARP's conflict resolution system (see **1.5 Private Right of Action**).

In the last 12 months, the ARP has issued, among others, one major decision in which it ordered the termination of an illegal comparative advertising campaign for a baby cream product. The APR found that the advertiser's claim that baby cream products that contain zinc oxide are unhealthy was not substantiated scientifically, violating the accuracy principle, while it disparaged the products and reputation of the competitor by making

a direct and unethical comparison with baby cream products that contain zinc oxide.

4. Social/Digital Media

4.1 General Requirements

There are no specific rules or regulations applicable to advertising on social media, thus the general rules of the Advertising Code and the Law on Unfair Commercial Practices apply.

Additionally, the ARP has issued guidelines on good practices in digital marketing communications and online behavioural advertising aimed at ensuring transparency and identification of advertising communications in the digital world.

Similarly, the DGC has issued a guide with information on rules and good practice in commercial communication in digital media, with a focus on influencer marketing (see 5.2 **Special Rules/Regulations on Influencer Marketing Campaigns** for more details).

Although these guidelines are non-binding, their content pertains to the Advertising Code and the Law on Unfair Commercial Practices.

4.2 Key Legal Issues

From our experience the following are some of the most relevant legal challenges faced by marketers in the context of social media advertising:

- Data, privacy, and data protection – digital marketing practices, such as targeted advertising and profiling, are highly dependent on the collection and processing of great amounts of data; the GDPR and privacy laws, especially the upcoming e-Privacy Regulation, together with the increasing use of various adtech solutions, have an impact on digital marketing practices.
- Intermediaries liability – with the upcoming Digital Services Act, the monitoring duties of platform providers may change, concomitantly affecting the way advertising is integrated in social media platforms.
- Consumer protection – the EU consumer protection rules have been focusing more on the digital economy (eg, Directive (EU) 2019/2161); these new rules have an impact on the digital marketing strategies of marketers, such as rankings.

4.3 Liability

There are no specific rules applicable to posts from third parties on the advertiser's site or social media channels. However, more general legislation consumer protection and advertising standards legislation may apply.

Consumer Protection

Under Directive (EU) 2019/2161, traders must ensure that the reviews associated with their products or services originate from consumers who have used or purchased the respective products or services. In this regard, a trader is obliged to provide information to consumers about the measures deployed to ensure the origin of the review. If the trader fails to implement an adequate process or deploy the necessary technical means, it may be considered an unfair commercial practice (ie, misleading consumers by stating that reviews of a product were submitted by consumers who had used or purchased that product).

Although the Directive has not been yet transposed in Portugal, this is an important provision for digital advertising, as it addresses the commercial reality of consumers, increasingly relying on consumer reviews and endorsements when they make purchasing decisions.

Advertising Code and Law on Unfair Commercial Practices

If the content posted by third parties constitutes an advertising communication organised by the advertiser (ie, through influencer marketing), the advertiser is to be found liable in accordance with the general advertising rules (see 5.3 **Advertising Liability**).

4.4 Disclosure

Since there are no specific rules on advertising in social media, the general disclosure requirements applicable to traditional media also apply to social media advertising.

In this regard, the DGC (see 4.1 **General Requirements**), interpreting the principle of identification in the light of social media, suggests as good practice for advertisers (or influencers):

- identifying, at the beginning of the communication, the existing business relationship (eg, sponsorship, partnership, etc);
- including, at the communications' beginning, #AD or AD adapted to the platform in question; and
- identifying any other benefits when applicable by hashtag or by name (eg, "offer").

4.5 Platform Requirements

There are no unique rules applicable to the use of any major social media platforms in Portugal.

4.6 Native Advertising

There are no specific rules applicable to native advertising in Portugal. General advertising rules apply.

Considering the nature of native advertising, it is important to ensure that the advertising communication is clearly identified

as such and that there is no risk of it being perceived by the consumer as the publisher's content.

In this regard, Press Law (Law 2/99 of January 13th, as amended) mandates that all written or graphic advertising, which is not immediately identifiable, must be identified as such using the word "Advertising" or the letters "AD" ("*Publicidade*" or "*PUB*" in Portuguese) at the beginning of the communication, together with the name of the advertiser, should their identity not be evident.

5. Influencer Campaigns

5.1 Trends

More and more advertisers are using influencer marketing as an integral part of their digital marketing campaigns in Portugal.

All social media platforms are used, with a Instagram being the preferred choice, while various products and services are advertised.

From a regulatory standpoint, influencer marketing appears to be of interest to the national regulatory authorities, taking into consideration the issuance of the DGC's guide mentioned in **4.1 General Requirements**.

5.2 Special Rules/Regulations on Influencer Marketing Campaigns

There are no specific rules or regulations applicable to advertising in social media, thus the general rules of the Advertising Code and the Law on Unfair Commercial Practices apply (see **4.1 General Requirements**).

Nonetheless, the DGC's guide aims at interpreting these general rules in the light of digital media and influencer marketing (see **4.4 Disclosure**).

The following guidelines are given to advertisers and influencers:

- Advertisers are obliged to:
 - (a) ensure that influencers clearly and unambiguously identify, in each publication, the nature of that publication as a form of advertising, and mention the business links involved; and
 - (b) have control mechanisms in their communication strategies, since digital influencers are not necessarily experienced marketers.
- Influencers are obliged to:
 - (a) identify communications as advertising where applicable;
 - (b) ensure that any presentations and recommendations

- are not false or misleading; and
- (c) ensure that the statements made on their behalf are based on actual experiences.

5.3 Advertiser Liability Liability

Considering the information provided in **5.2 Special Rules/Regulations on Influencer Marketing Campaigns**, there are not specific rules applicable to influencer marketing. In accordance with the general rules (see **1.3 Scope of Liability**), the advertiser, the influencer and any agencies involved share responsibility for the commercial communications they disseminate.

In other words, in the event that the advertiser has provided specific advertising instructions to the influencer, such as a script or a dialogue, and the influencer disregards these instructions, the advertiser may not be held liable if it is proved that the influencer acted on their own.

Monitoring Obligation

Without prejudice to the answer provided above in **5.2 Special Rules/Regulations on Influencer Marketing Campaigns**, in accordance with the general advertising laws, the advertiser has no obligation to monitoring its influencer(s).

6. Privacy and Advertising

6.1 Email Marketing

In Portugal, there is no uniform framework applicable to email marketing. Instead, laws regulating data protection, privacy and e-commerce are all potentially relevant.

Data Protection

Regulation (EU) 2016/679 (General Data Protection Regulation - GDPR), together with the law executing the GDPR in Portugal (Law 58/2019 of August 8th), regulate data protection. Under the GDPR, direct marketing, such as email marketing, is only lawful upon the informed and express consent of the data subject. Data subjects can withdraw their consent freely at any time, in which case advertisers must stop such communications.

Subject to any other measures, according to the GDPR, the Portuguese Data Protection Authority (*Comissão Nacional de Proteção de Dados* - CNPD) may impose a fine for infringements of up to EUR20 million or 4% of annual global turnover, whichever is greater.

Privacy

Under the e-Privacy Law (Law 41/2004, of August 18th, as amended), all unsolicited direct marketing communications, including email marketing, are contingent on the prior and

express consent of the subscriber or user. As an exemption, direct marketing activities without prior consent are allowed only when:

- email contact details were obtained from the consumer within the context of the sale of a product or provision of a service;
- the communication is limited to the marketing of products or services similar to those traded at the time of collection of the contact details; and
- in accordance with the GDPR, the consumer had the option to refuse such communications when the data was collected, and the possibility to opt out is given in each communication.

Note that unsolicited communications to legal persons are permitted for direct marketing purposes, unless they refuse future communications.

Lastly, the advertiser should be identified in each communication, as well as the means for the recipient to opt out.

Aside from possible liability vis-à-vis the consumer or the possibility of another fine being imposed in relation to a data protection infringement, in violation of the obligations above, an administrative fine of EUR1,500 to EUR25,000 (if the advertiser is a natural person) or of EUR5,000 to EUR5 million (if the advertiser is a legal person) may be imposed by the competent authorities: the Portuguese regulatory authority for postal communications and electronic communications (*Autoridade Nacional de Comunicações* – ANACOM) or the CNPD.

E-commerce

Under the Portuguese e-Commerce law, all advertising communications provided at a distance by electronic means, such as email advertising, must be clearly identified in order to be easily understood by the consumer.

In particular, the following information should be provided:

- clear identification of the advertising nature of the communication, as soon as the message is presented;
- clear identification of the advertiser; and
- clear identification of any other benefits (eg, offers, discounts, prizes or gifts, promotional contests or games) when applicable, and their conditions.

Aside from a possible liability vis-à-vis the consumer, in violation of the obligations above, an administrative fine of EUR2,500 to EUR50,000 may be imposed by the competent authority (ANACOM).

6.2 Telemarketing

Please refer to **6.1 Email Marketing** as the same laws apply for telemarketing.

Moreover, under the Law on Call Centres (Decree-Law 134/2009 of June 2nd, as amended), there are certain information requirements that apply to this marketing practice:

- the communication must be clear and objective, provided in an easily accessible language and capable of answering any questions raised;
- the information must be provided in Portuguese;
- the questions asked must be answered immediately or, if this is not possible, within a maximum period of three working days, counted from the date of the initial contact by the consumer, unless duly justified.

A violation of these obligations would result in a fine of EUR250 to EUR3,740 (if the advertiser is a natural person) or EUR500 to EUR44,890 (if the advertiser is a legal person) imposed by the competent authority (ASAE).

6.3 Text Messaging

Please refer to **6.1 Email Marketing** as the same laws apply for text messaging.

6.4 Targeted/Interest-Based Advertising

Please refer to **6.1 Email Marketing** as the same laws apply to targeted advertising.

In addition, there are rules specifically applicable to the processing of personal data through the collection of cookies (which facilitate targeted/interest-based advertising). Under the GDPR and the e-Privacy Law, the collection, use, and sharing with third parties of data collected through cookies is dependent on the data subject's express consent, except for the collection of cookies strictly necessary for the provision of the service (eg, cookies without which a website would not function properly).

Moreover, when targeted advertising is carried out through automated decision making, the GDPR poses stricter information obligations on data controllers and it sets additional measures for the protection of the data subjects, namely:

- the data subjects shall have the right to object, at any time, to the processing of their data related to direct marketing;
- when the data subject objects to processing for direct marketing purposes, their personal data shall no longer be processed for those purposes;
- at the time of the first communication with the data subject, at the latest, the right to object to the processing shall be

explicitly brought to their attention, presented clearly and separately from any other information; and

- when information society services are used, the data subjects may exercise their right to object by automated means using technical specifications.

6.5 Marketing to Children

There are specific provisions applicable for marketing targeted to children, both in the Advertising Code and in the GDPR.

It should be noted that the Portuguese Civil Code defines minors as anyone under the age of 18.

Advertising Code

The Advertising Code establishes a general restriction on advertising content directed at minors. Specifically, advertising directed at minors:

- must not exploit, either directly or indirectly, children's inexperience or gullibility (ie, through the parents) or incite them to buy a certain good or service;
- must never contain elements that could endanger the physical or moral integrity of minors, as well as their health or safety, namely by containing pornographic scenes or violence;
- must not exploit their psychological vulnerability, such as their strong reliance on their parents, teachers or tutors;
- may only include minors playing a role in advertising communications where there is a direct relationship between them and the product or service.

Additionally, the DGC has issued specific recommendations for advertising communications directed to or portraying minors.

GDPR

Under the GDPR, personal data is defined as "any information relating to an identified or identifiable natural person (data subject); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person"

In relation to the processing of personal data pertaining to children, the GDPR and the Portuguese Law for the implementation of the GDPR set 13 as the age of lawful consent to be provided by minors themselves for the processing of data in relation to information society services. The processing of the personal data of children in relation to information society services below 13 years of age is subject to the consent of their legal representatives.

7. Sweepstakes and Other Consumer Promotions

7.1 Sweepstakes

The laws governing the conduct of sweepstakes and contests are set out below:

Gambling Law

The Portuguese Gambling Law (Decree-Law 422/89, as amended) specifies that sweepstakes, contests, as well as other miscellaneous things similar to games of fortune or chance may be exploited by for-profit entities only in the case of competitions related to knowledge, hobbies or other things, and organised by newspapers, magazines, radio or television stations, and advertising contests to promote goods or services.

Moreover, such games must not cause any expenditure for the player other than the normal cost related to participation, such as public postal and telecommunications services without any added value, or the cost of purchasing a newspaper or magazine that hosts the sweepstake. Note that, in this case, the newspaper or magazine should be a periodic publication established for over a year.

Those things similar to games of chance should not develop themes related to gambling (eg, poker or roulette) nor replace the prizes with cash or tokens.

Law on Unfair Commercial Practices

The Law on Unfair Commercial Practices sets two important requirements for contests:

- Entities must not announce a contest or promotion involving a prize without delivering the described prizes or a reasonable equivalent.
- It is prohibited to convey the false impression that the player or consumer will win or wins a prize or other advantage when, in fact, there is no prize nor advantage; it is also forbidden to organise a sweepstake in which claiming the prize or advantage is contingent on the performance of certain actions requiring the player or consumer entailing further expenses.

Civil Code

Under the Portuguese Civil Code, sweepstakes are public promises (ie, someone promises a benefit to others through a public announcement and is immediately bound by that promise). Therefore, the entity organising the sweepstake must comply with the terms set for the contest, including a public notice setting the deadline for submissions from participants.

Advertising Code

The general rules of the Advertising Code apply in the advertising of sweepstakes. Therefore, the advertising must clearly and objectively identify the terms of participation and any other material information (eg, deadlines, prizes and period to collect prizes).

7.2 Contests of Skill

The Portuguese Gambling Law distinguishes between contests of skill, which are classified as types of game *similar* to games of fortune or chance, and games of fortune or chance.

Contests of skill are those whose results depend on the player's expertise or skill or on skill and luck, contrary to games of chance where the results depend solely or mostly on luck.

Contests of skill, such as trivia contests, fall under the same general category as sweepstakes, contests and miscellaneous types of games similar to games of fortune or chance. See 7.1 Sweepstakes.

7.3 Regulatory Bodies

Under the Portuguese legal framework, different types of game require a different registration or approval process.

Games of fortune and chance, such as sweepstakes and contests of skill, are subject to previous authorisation by the respective municipal council, depending on the territorial scope of the contest.

On the contrary, the supervision and authorisation of games of fortune or chance is the responsibility of the member of the government responsible for the tourism industry. Without prejudice to online gambling, note that the exploitation of games of fortune or chance is only permitted in casinos located in permanent or temporary gambling zones created by law, with some exceptions such as the operation of games on ships or aircraft.

7.4 Loyalty Programmes

There is no comprehensive framework regulating loyalty programmes in Portugal. Without prejudice to the application of consumer and data protection laws, the specific applicable laws or regulations may depend on the commercial conditions of the loyalty programme in question.

7.5 Free and Reduced-Price Offers

Reduced-Price Offers

Aside from the primary advertising laws, in Portugal, reduced-price offers of goods or services are further subject to Decree-Law 70/2007 of March 26th, as amended. This legal instrument applies both to retail sales in store and at a distance and to the provision of services.

When advertising reduced-price offers, the price reduction announced by the seller must be real, with reference to the lowest price previously set for the same product or, in the case of products not previously commercialised, with reference to the price to be set after the reduction period.

Additionally, all sales with a price reduction must indicate the type of sale, the type of products, the percentage of price reduction, as well as the start date and duration period of the reduced-price offer.

Note that the Portuguese e-Commerce Law applies similar rules to reduced-price offers through digital marketing communications.

Free Offers

Under the Law on Unfair Commercial Practices, describing a product or service as "free", "no cost" or "free of charge", or with a similar expression, when the consumer must pay for the collection or delivery of the good, is considered an unfair commercial practice.

Additionally, specific laws forbid making certain products, such as tobacco-related products and medicines, available under such offers or restrict the free commercialisation of certain products to certain consumer groups, such as infant formula.

7.6 Automatic Renewal/Continuous Service Offers

Under the Portuguese Consumer Law, information obligations include that the provider of goods or services should inform the consumer about the duration of the contract.

Concomitantly, the provider must inform consumers about an automatic renewal of the contract, termination conditions and consequences, and the consumer's right to withdraw and how it may be exercised.

The Portuguese Distance and Off-Premises Contract Law (Decree-Law 24/2014 of February 14th) includes similar information obligations.

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