

Directive 1/2009

On Advertising in Periodicals

Lisbon, 1 June 2009

Conselho Regulador da Entidade Reguladora para a Comunicação Social [Regulatory Board of the Regulatory Authority for the Media]

Directive 1/2009

on Advertising in Periodicals

A. Subject

1. The subject of this Directive is the dissemination of advertising material through the print media.

B. Scope

2. This Directive applies to Portuguese periodicals. This includes both those that correspond to a specific doctrine and those that are informative, those that are general and those that are specialised, whether they are national, local or aimed at Portuguese communities overseas, as well as foreign publications edited in Portugal.

C. Principle of identifiability and separation

3. According to article 28 no.2 of the *Lei de Imprensa* [Press Law] (Law no. 2/99 of 13 January) *All text-based advertising or image-based advertising, that is not immediately identifiable as such, shall be identified by the word "Publicidade" [Advertising] or the capital letters 'PUB' [AD], at the start of the advertisement. It shall also contain the name of the advertiser when this is not evident.*

4. For the purpose of the article cited in the previous point and without prejudice to any other features which may be taken into account, *text-based advertising or image-based advertising* is automatically deemed to have been identified if it has at least two of the following features:

- a) Line with a colour or width that is different to that used in lines for dividing up editorial content;
- b) A spot of colour different to those used in editorial content;
- c) Another type of visual page division that is different to the divisions used for editorial content.

5. Advertisements that have not been identified with any of the features mentioned in paragraphs a), b) or c) of the previous point must contain the word "Publicidade" or

the capital letters “PUB”, in a legible font size, at the start of the advertisement. They must also contain the name of the advertiser when this is not evident.

D. Text-based Advertising

6. For the purpose of this Directive, any advertising in the form of one or more pieces of text, which due to the form it takes, its presentation, style of writing, structure and use of visual elements, could be mistaken for a journalistic text, is deemed to be *text-based advertising*.

7. In addition to the identifiers set out in points 4 and 5 above, text-based advertising (by public or private bodies) must explicitly specify the name of the body concerned or of the good or service being promoted, in a way that differs from the text itself.

E. Advertorials

8. For the purpose of this Directive, those texts, images and other visual elements aiming to promote or advertise a specific product, body or service, which have the formal characteristics of and may be mistaken for reporting are deemed to be *advertorials*.

9. Advertorials must always be identified in a clearly visible manner, in accordance with the provisions of point 7 above.

F. Sponsorship, contributions and other forms of endorsement

10. Taking into account current practices in periodicals, for the purpose of this Directive, when natural or legal persons, not including news organisations, are involved in financing the production of any type of journalistic content, with the intention of promoting their name, brand or image, as well as their operations, goods or services, this is deemed to constitute sponsorship.

11. Journalistic content that is published and to which natural or legal persons outside of news organisations have contributed, with the intention of promoting their name, brand or image, as well as their operations, goods or services, must be expressly identified as a “sponsorship”, “contribution”, “endorsement” or using an equivalent expression. It must also identify either the sponsor or the relevant good or service.

12. The phrases referred to in the previous point must be separate from the pieces of text, images or other visual elements produced by journalists. Journalistic content must not contain any direct or indirect references to sponsors or their available goods and services.

G. Commercial information

13. Those pages, texts or other visual elements in editorial sections that are merely intended to present, describe and evaluate products, brands, goods, services or points

of sale must be identified with the phrase “*informação da responsabilidade do Departamento Comercial*” [this information falls under the responsibility of the commercial department], or an equivalent expression, to explain to the reader that they are not journalistic in nature, despite the fact they are not part of a paid advertisement. These conditions also apply to press releases and equivalent forms of information produced and distributed by commercial enterprises or their representatives.

H. False covers

15. If a periodical has a “false cover” or “false front page”, it must be expressly identified as such using the expression “PUB” or “Publicidade” in a legible font size, and must contain the title and logo of the publication, not including the reference to the director or the editorial board.

16. For the purpose of the previous point, the term “false cover” is understood to mean any advertising space that is been purchased and disseminated by an advertiser, in the form of a cover that is wrapped around the publication, completely or partly covering its real cover.

17. False covers must not contain or give indication of editorial content, or excerpts thereof, from the edition they are distributed with or previous editions of the publication.

I. Self-promotion/Marketing

18. The pages of a publication intended for the purpose of self-promotion, i.e. of the publication itself; initiatives led by the publication; related competitions, offers and sales; or any subproducts, regardless of their effect on the cover price or their characteristics, should be identified as a “*Promoção*” [promotion], “*Iniciativas*” [initiative] or “*Acções*” [(advertising) measures] or using another equivalent term, so that it is clear to the reader that they do not constitute editorial material.

19. Self-promotional content on pages which also contain editorial content must be identified in accordance with point 4 of this Directive.

20. If “invitations” relating to self-promotion are published on the front page or on another editorial page, which would not be immediately identifiable as relating to self-promotion due to their contents or their very nature, they must be identified in accordance with points 3 and 4 of this Directive.

21. For the purpose of the previous point, remarks containing expressions such as “offer”, “free”, “for ... euros more” and similar phrases are automatically deemed to be immediately identifiable as self-promotional content.

J. Editorial supplements

22. Text-based advertising, image-based advertising, advertorials and all other types of advertising in editorial supplements are subject to the provisions contained in this Directive, in particular, those provisions referring to the principles of identifiability and separation set out in points 3 and 4 above.

K. Commercial supplements

23. Commercial supplements distributed along with a publication must include the phrase “Publicidade” or “PUB” or the term “*Suplemento Comercial*” [Commercial Supplement], in a clearly legible font size.

24. Commercial supplements containing editorial content must make this clearly separate from advertising content. They must identify such advertising content in accordance with points 3 and 4 of this Directive.

25. Commercial supplements must include a sheet with information on who is responsible for the initiative and creating its contents.

Lisbon, 1 July 2009

The Regulatory Board,

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Statement of reasons

In Ruling 1/PUB-I/2008 of 31 January on the “Advertising practices in periodicals”, the *Conselho Regulador* [Regulatory Board], in exercise of its own regulatory powers, informed the directors of media entities that they had uncovered “advertising practices which risked breaching the legal and ethical requirements governing journalistic activity”. The Board went on mention the “significant volume of text-based advertising that does not always comply with the provisions in article 28, nos. 2 and 3 of the Press Law, with such practices constituting violations of the basic rules of our ethical and legal order and being subject to penalties under article 35, no.1 paragraph b) of the Press Law”. The Board also expressed its concerns about “advertising practices that encroach on journalistic spaces, interrupting and breaking up news articles by placing advertising messages in them”.

Following this Ruling, the Regulatory Board proceeded to map different types of advertising in periodicals. This resulted in a study with the aim of consulting with bodies linked to print media or the advertising industry, including those with editorial and commercial responsibility in relation to periodicals.

The study mainly consisted in identifying best practices for placing advertisements in relation to identifying and separating journalistic and advertising content, whatever form this may take.

On 14 January 2009, the Regulatory Board approved the *Projecto de Directiva sobre Publicidade em Publicações Periódicas* [Draft Directive on Advertising in Periodicals] by means of Ruling 1/OUT-I/2009. It also decided to submit it for public consultation, making the text available on the website of the Regulatory Authority for the Media (ERC) and proceeding to send to those institutions relating to the press or advertising industry as well as those with editorial and commercial responsibility in relation to periodicals for any potential comments.

Bringing together the wide range of contributions that had been received during the public consultation phase were brought together. As a result, the Board realised that the main reservations regarding the adoption of the Directive raised by some of the stakeholders came from the contention that there was already enough regulation on the subject, or the claim that it would result in unequal conditions, which would affect the competitiveness of print media compared to other media.

However, none of the concerns raised about the necessity and proportionality of the provisions of this Directive appear to be justified.

It is important to point out that the Directive is subject to the primacy of law. It cannot and must not go beyond what is stipulated in the legal provisions governing its subject matter. As emphasised in the statement of reasons accompanying the draft, the aim of the Directive is to “provide some clarification regarding the practices in relation to advertising in periodicals and make them more systematic”. This “will guide the future regulatory action of the ERC and create transparency, allowing its addressees to gain awareness of the relevant principles, specifically those relating to how to examine any complaints they receive about advertising in periodicals”.

Therefore, the Directive is not intended to impose different rules on its addressees to those already laid down in the law or prejudice them in relation to other types of media activity. As stated above, the aim of the Directive is to provide both industry stakeholders and consumers with a point of reference regarding the practices the regulator deems to be appropriate, in strict accordance with the legal regulations governing advertising activity in print media. The adoption of the Directive, due to undergo preliminary debate involving those with editorial responsibility for periodicals, will be highly valuable in terms of legal certainty and transparency, offering them greater assurances than would result from a process of creating established case-law, which would have to take place on a post-hoc, case-by-case basis.

Moreover, the Directive aims to “promote standards of good practice”, in accordance with article 63, no.1 of the *Estatutos da ERC* [ERC Statutes]. It is important to emphasise this phrase to be able to understand that this regulatory instrument is not intended to add anything to the set of legal obligations governing its subject matter. It should therefore be interpreted as consolidating the practices that are grounded in the principles and rules governing advertising activity in print media. The ERC made sure to maintain strict compliance with the principles of legality, necessity, clarity, participation and openness throughout the preparation and creation of the Directive.

Indeed, this can be seen in article 8 of the *Código da Publicidade* [Advertising Code], which establishes the principle of identifiability. It may also be seen in article 28 of the Press Law. This context provides the foundation for the solutions put forward in this Directive, whose purpose it is to identify advertising practices used in periodicals and uses them to create standards regarding what is acceptable in relation to positive law.

In conclusion, the concerns raised by some of the bodies consulted about the need for the Directive do not appear to be relevant, given that the good practices it puts forward are supported by already existing legal regulations, as well as the fact that it aims to provide legal certainty for the wide range of stakeholders who are engaged in activity within the sector. It clarifies the regulatory activity that the ERC is proposing to develop in this regard and makes it more transparent, including for consumers. However, this instrument does not prevent periodicals from agreeing to introduce other good practices that are equally consistent with the law.

Without prejudice to what has been stated above, the contributions received during the public consultation phase and the resulting discussions were valuable. As a result,

the Regulatory Board has incorporated proposals and suggestions into the Directive that will allow improvements to be made in relation to the project under consultation.