

CHAPTER 13

Portugal

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I. Possible Bans on Food Advertising

1. Is there any general national legislation or code of conduct regulating the promotion of foodstuffs?

Food law is still an emerging area of law in Portugal. The legislative process has been developed in line with the law of the European Union (EU), mostly through Regulations, which are directly applicable in the Portuguese legal system. The promotion of foodstuffs is not regulated by a specific document. The main national legislation regarding promotion and advertising of foodstuffs are the Portuguese Advertising Code¹ and Decree-Law 560/99 of 18 December², which transposed into national law Directive 97/4/EC of the Council of 27 January and Directive 1999/10/EC of the Commission of 8 March on the approximation of legislation of the Member States with respect to the labelling, presentation and advertising of foodstuffs intended for the final consumer and also Decree-Law 57/2008 of 26 March³ regarding unfair commercial practices.⁴ The Portuguese Advertising Code does

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1 Decree-Law 330/90 of 23 October, published in the Official State Gazette, 1st Series, No 245, 1990, last amended by Law 8/2011 of 11 April.

2 Decree-Law 560/99 of 18 December, published in the Official State Gazette, 1-A Series, No 239, 1999, last amended by Decree-Law 156/2008 of 7 August.

3 Decree-Law 57/2008 of 26 March, published in the Official State Gazette, 1st Series, No 60, 2008.

4 These Directives amended Directive 79/112/EEC of 18 December 1973 on the approximation of laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer. Directives 97/4/EC, 1999/EC and 79/112/EEC were later codified by Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of laws of the Member States relating to the labelling, presentation and advertising of foodstuffs.

not have specific provisions regarding foodstuff, however it clearly states that “*all advertising which is considered to be misleading under the terms of Decree-Law 57/2008 of 26 March*” is forbidden⁵, providing specific provisions for alcoholic beverages, medicinal products and the health and safety of consumers. Finally, Decree-Law 560/99 specifically provides that the indications included in the labelling shall not be presented in a misleading way to the consumer, which is applicable to the advertising of foodstuffs as well.⁶

2. Is the promotion of certain foodstuffs restricted or prohibited by any national mandatory and/or soft laws (e.g., code of practice, case-law)?

The Portuguese Advertising Code establishes restrictions on the advertising of certain foodstuffs (i.e. alcoholic beverages). Article 17 of the mentioned Code limits the advertising of alcoholic beverages, only authorizing it in specific circumstances, namely whenever it does not (i) specifically target minors of age and does not show them consuming alcoholic beverages; (ii) encourage excessive consumption; (iii) disregard consumers; (iv) promote the idea of success, social benefit or special abilities as a result of the consumption; (v) suggest the existence of therapeutic qualities or stimulant effects; (vi) connect the consumption of alcohol related to sports or driving activities; and (vii) promote the alcoholic level as something positive. Advertising of alcoholic beverages on TV from 7:00 am until 9:30 pm is prohibited.

Furthermore, any type of advertising that encourages behaviors that cause damage to the consumer’s health and security, namely as a result of lack of information regarding the danger the product may cause or of the specific ability of causing accidents, as a result of the use of the product, is not allowed.⁷

Concerning codes of practice in particular, ICAP – Instituto Civil da Autodisciplina da Comunicação Comercial – a Portuguese self-regulatory

5 Art. 11 of Decree-Law 330/90 of 23 October.

6 Art. 23 of Decree-Law 560/99 of 18 December.

7 Art.13 (1) of Decree-Law 330/90 of 23 October.

Association for the advertising area, has a Code of Conduct regarding Advertising and other Commercial Communications establishing specific provisions concerning alcohol as well. The provisions of the Code of Conduct bind the members of this particular Association (ICAP), which has now over one hundred companies as members (such as Beiersdorf, Coca-Cola, GSK, L'OREAL, and Vodafone, among others.)

The Portuguese Advertising Code does not provide any other specific provisions regarding foods. Decree-Law 57/2008 of 26 March, on misleading commercial practices, prohibits any commercial practices likely to contain false information that may mislead the consumer regarding the characteristics of a certain good, including foodstuffs.⁸

The relevant case law is the one issued by ICAP regarding the application of the legal provisions applicable to the advertising of foodstuffs.

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3. Is the promotion of (certain) foodstuffs towards a specific section of the population restricted or prohibited by any national mandatory and/or soft laws?

The Portuguese Code of Advertising prohibits the advertising of alcoholic beverages to minors of age (18 years old). Article 17(5) states that any commercial communications and advertising of any events where the participants are minors, namely sports, culture, and recreational activities must not mention, implicit or explicitly, the brand or brands of alcoholic beverages.

Furthermore, the Portuguese Code of Advertising establishes that advertising addressed to minors of age should always take into account their psychological vulnerability and it should not (i) encourage them to purchase a specific good (which includes foodstuffs) or service based on their inexperience and credulity, or (ii) encourage them to persuade their parents to buy a certain product.⁹

8 Art. 7 of Decree-Law 57/2008 of 26 March.

9 Art. 14 of of Decree-Law 330/90 of 23 October.

The mentioned Code also prohibits any kind of advertising which may be harmful to the health and security of the consumer (including foodstuff), stating that this shall be taken into account, in particular, regarding advertising aimed at children, adolescents, elderly people or handicapped persons.¹⁰

II. Misleading Advertising

1. What are the national rules on misleading advertising with respect to foodstuffs?

In Portugal, the specific national provisions ruling misleading advertising with respect to foodstuffs are similar to the ones established at the EU level and are included in Decree-Law 560/99 of 18 December.

The rules concerning labelling indications apply to the presentation and advertising of foodstuffs, its form or looks, package size, way in which foodstuffs are put up, as well as the environment to which they are exposed.¹¹

Moreover, advertisements that attribute prevention, treatment and curative properties to foodstuffs or mention such properties are forbidden.¹²

The Portuguese Advertising Code establishes the principle of truth in article 10, stating that advertising must be truthful and not distort facts. According to the same article, all facts relating to the nature, composition, characteristics and purchasing conditions of the advertised goods must be accurate and likely to be evidenced at any moment by the competent authorities. As previously mentioned¹³ the same Code expressly forbids misleading advertising.

10 *Ibid*, Art. 13.

11 Art. 23 (3) of Decree-Law 560/99 of 18 December.

12 Art. 23 (2) of Decree-Law 560/99 of 18 December.

13 *Vide* 1.1.

2. What are the national landmark cases regarding misleading advertising for foodstuffs?

The Court case law regarding misleading advertising for foodstuffs in Portugal is not abundant. However, Portugal has a self-regulatory organization for advertising – Civil Institute for Self-Regulation of Commercial Communication (ICAP) – that takes decisions regarding litigation on advertising matters. The complaints addressed to ICAP are based on the breach of the advertising legislation in force and ICAP's Code of Conduct, which is very similar to the Portuguese Code of Advertising, however, not legally binding, only binding the associates of ICAP.

In 2011, ICAP issued a decision¹⁴ regarding a litigation proceeding between two companies of the food industry (ANID and LACTOGAL) on misleading advertising. ANID considered that LACTOGAL breached the principle of truth due to misleading advertising. In the advertisement at stake, LACTOGAL compared its milk to other kinds of milk (but not naming other brands) and advertised certain characteristics of its milk, such as mentioning the milk's flavor as a distinct element and the milk's capacity to better preserve nutrients, which were considered as misleading advertising by ICAP. In fact, ICAP considered that the idea of exclusivity of LACTOGAL's milk, implicated by the advertisement, created the impression that LACTOGAL's milk was superior to the other brands. Moreover, ICAP further considered that LACTOGAL did not prove that its milk was more fresh, had more nutrients and was more beneficial to children under 12 months as when compared to the mainstream milk of consumption. In this sense, ICAP considered that LACTOGAL's advertisement breached both the Advertising Code and Decree-Law 57/2008 of 26 March regarding unfair commercial practices, since the advertising in question was misleading to the consumer.

In 2010, there was another litigation¹⁵ concerning the advertising of Tunacol canned tuna, where the producer of Tunacol, Ramirez & C^a, had included a health claim in the advertisement, stating that Tunacol reduced bad choles-

14 Proceeding 4J/2011, 2nd Section of ICAP's Ethical Committee of 3 March 2011.

15 Proceeding 27J/2010, 1st Section of ICAP's Ethical Committee of 21 December 2010.

terol up to 15 %. The complaint was presented by APIFARMA (Portuguese National Association of the Pharmaceutical Industry), arguing that the health claim in the advertisement was not substantiated by any studies and that there was a breach of the EU Regulation 1924/2006 of 20 December 2006 on nutrition and health claims made on foods.¹⁶ ICAP concluded that the advertisement's health claim was not proved and could mislead consumers as regards the characteristics of the good (Tunacol). ICAP further added that the characteristics advertised (reduction of cholesterol) were similar to an advertisement for a medicinal product. Therefore, ICAP's Ethical Committee decided that Tunacol's advertisement was in breach of ICAP's Code of Conduct, of the Portuguese Advertising Code and of the legal provisions on unfair commercial practices (Decree-Law 57/2008 of 26 March).

III. Mandatory Labelling: Name of the Product

Are there any national definitions of a foodstuff that could hamper the marketing of an imported food product?

Mandatory labelling legislation in Portugal is harmonized by EU legislation. The national applicable law regarding foodstuff labelling in general is Decree-Law 560/99 of 18 December, previously mentioned, in conjunction with European Regulations (Regulation (EU) 1169/2011 of 25 October, Delegated Regulation (EU) 1155/2013 of 21 August, Implementing Regulation (EU) 1337/2013 of 13 December and, most recently, Delegated Regulation (EU) 78/2014 of 22 November). There is also specific national legislation regarding nutritional labelling, namely Decree-Law 167/2004 of 7 July and Decree-Law 136/2003 of 28 June, concerning food supplements.

There are no legal definitions of "energy drinks", "sport drinks" or cheese in our national law or arising from case law.

¹⁶ Please note that this decision has been pronounced before the adoption of the union list establishing the authorised functional health claims (Regulation N° 432/2012).

Regarding “yogurt” specifically, Ministerial Order 742/92 of 24 July¹⁷ provides the following definition: “*Yogurt – the curdled product obtained from lactic fermentation due to the exclusive action of *Lactobacillus delbrueckii subsp. bulgaricus* and *Streptococcus thermophilus* on the milk and other milk products (...), and the flora shall be live and abundant in the final product*”¹⁸

The legal definition of “bread” is provided in Decree-Law 289/84 of 24 August¹⁹ which establishes the characteristics of the different types of bread and related products and regulates certain aspects of its commercialization. “Bread” is defined in article 2 as “*the product obtained from the pressing, fermentation and cooking in adequate conditions, of the wheat flour, rye, triticale or corn, pure or mixed, according to the types legally established, clean water and ferment and yeast, as well as the possibility of use of other ingredients, such as additives, and also processing aids within the conditions legally established*”.

There is no vertical legislation in Portugal not harmonized at the European level regarding the naming of food products that is likely to hamper the marketing of foodstuffs.

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IV. Voluntary Labelling

1. “Clean labels” – Are there any national definitions or requirements for the use of claims such as ‘natural’, ‘pure’, ‘home-made’, ‘additive-free’?

The Portuguese legislation does not provide rules regarding clean labels specifically, nor any similar claims related to clean labels, such as “natural”, “pure”, “home-made”, etc. There are only indirect references in the law. For

17 Ministerial Order 742/92 of 24 July, published in the Official State Gazette, 1-B Series, No 169, 1992.

18 The Ministerial Order is still in force.

19 Decree-Law 289/84 of 24 August, published in the Official State Gazette, 1st Series, No 196, 1984.

instance, Decree-Law 120/2011 of 28 December²⁰ provides a definition of “non-transformed foodstuffs” stating that these types of foodstuffs were not submitted to a treatment likely to cause a substantial amendment of their original state but which may, however be divided, separated, sliced, or sold boneless, minced, peeled, trimmed, grated, selected, clean, tailored, quick-frozen, frozen, under low temperatures, crushed or shelled, packaged or not. This definition does not match the claim “natural”, but it is the closest one in the Portuguese legislation. Furthermore, there is no relevant case law on “clean labels”.²¹

2. Nutrition & health claims

a. Within the list of health claims authorised pursuant to Regulation 1924/2006, are there any related substances that are prohibited or considered as a medicinal substance within your jurisdiction?

Regulation 1924/2006 is directly applicable in Portugal, and, therefore, the prohibitions included in this Regulation are applicable within the national jurisdiction. Portuguese legislation does not prohibit any of the substances listed in Regulation 1924/2006 or consider those substances as medicinal products.

b. Are there any national laws and regulations permitting food business operators to make reference to recommendations or endorsements by national associations, medical, nutrition or dietetic professionals, and health related charities?

Recommendations or endorsements by food business operators are not specifically regulated by Portuguese legislation and, consequently, there is no prohibition *de per se*. Such recommendations or endorsements may

20 Decree-Law 120/2011 of 28 December, published in the Official State Gazette, 1st Series, No 248, 2011.

21 As previously mentioned, there is little case law on foodstuff, in general.

be regarded as a mean of advertising within the Portuguese Advertising Code in case they are included in the advertising definition of article 3 of the Code, which provides that advertising consists in “*any mean of communication undertaken by public or private entities within a commercial, industrial, artisanal or liberal activity with, to direct or indirectly promote (...) ideas, principles, initiatives or institutions*”, and, consequently, should comply with the advertising principles established by the Code, namely the principle of veracity. However, in some cases, depending on the context in which the recommendations or endorsements are used, such recommendations or endorsements may be regarded as purely informative and not regarded as advertising under article 3 of the aforementioned Code, in which case advertising rules will not be applicable. There are some examples of recommendations and endorsements by food business operators in Portugal: for example, Danone, a famous Portuguese brand of yogurts, explicitly refers to medical societies and associations (Portuguese Society of Cardiology and the Portuguese Diabetics Association, among others) on its website (<http://www.danone.pt/saude/>). Becel’s website in Portugal contains an indirect recommendation from the Portuguese Foundation of Cardiology stating “*FCP recommends the consumption of food of plant origin in order to reduce cholesterol*” and displays this message and the foundation logo next to Becel products.²²

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c. Are there any national laws or regulations regulating the use of nutrition or health claims on non-prepackaged food?

Non-prepackaged food is ruled by Decree-Law 560/99 of 18 December. However, in what concerns nutrition or health claims, there are no specific rules.

d. Is there a notification procedure required prior to/for marketing foodstuffs bearing nutritional or health claims?

No, there is no national procedure required for marketing of foodstuffs bearing nutritional or health claims.

²² <http://www.becel.pt/proactiv/sobre-a-gama-pro-activ/shots-becel-proactiv.aspx>

Food supplements are subject to a notification procedure in Portugal. Food supplements are ruled by Decree-Law 136/2003 of 28 June²³, which transposed Directive 2002/46/EC into the national law. Food supplements will be classified as medicinal products only if they are covered and fall within the legal definition of medicinal product. Otherwise, food supplements are in the category of foodstuffs. In order to place food supplements on the market, the manufacturer or the person responsible for placing on the market (i.e. the distributor)²⁴ must proceed with a notification to the Governmental Entity supervising that area. This notification must be submitted to the Portuguese Food and Veterinary General Directorate (“DGAV”) which is the national competent authority regarding food supplements. The notification should be submitted online (suplementosDSNA@dgav.pt) together with a copy of the label.²⁵ Fortified food is not subject to specific national laws since Regulation 1925/2006 is directly applicable in Portugal.

V. Enforcement of Food Law and Self-Regulating Bodies

1. Which actions may one risk in case of non-compliance with the labelling or advertising requirements?

a. Public authorities

Whoever does not comply with labelling or advertising requirements may be subject to a misdemeanor procedure, either as a result of an inspection or the participation of a competitor. According to Decree-Law 560/99 of 18 December, the following events constitute infringements, sanctioned with fines that may range from € 99 up to € 3.740,98 for physical persons, and up to € 44.891,81 for legal persons:

23 Decree-Law 136/2003 of 28 June, published in the Official State Gazette, Series I-A, No 147, 2003, last amended by Decree-Law 296/2007 of 22 August.

24 Art. 9 of Decree-Law 136/2003 of 28 June.

25 Information available at <http://www.dgv.min-agricultura.pt>.

- (i) The lack, inaccuracy or deficient badge indication or of the mandatory indications in the labelling of foods;
- (ii) Indications in the labelling which are not allowed or are likely to mislead the consumer;
- (iii) The commercialization of foods in relation to which the “use-by” date has elapsed or is in breach with the legal requirements established for pre-packaged food for immediate sale;
- (iv) The commercialization of foods, sale or exhibition for sale to the final consumers of pre-packaged foods without a label written in the Portuguese language; and
- (v) The amendment, occultation or destruction of the mandatory indications to be included in the labelling.

The attempts of the infringement or negligent conduct or omission are also punished, and the removal of foods infringing the law may also be determined as an ancillary penalty.²⁶

b. Competitors and consumers

Concerning competitors and consumers or consumers associations specifically, once the Portuguese Food and Veterinary General Directorate (DGAV) was created in 2008, the Portuguese Authority of Food and Economic Safety (ASAE), which is the entity responsible for economic supervision and guaranteeing food safety, started to receive many reports both from individuals and public authorities (anonymous or identified). Until November 2013, 150.000 reports were made.

The available mean of reaction for consumers or consumer associations whenever there is a suspicion that food law was breached is to report to the ASAE or DGAV. The report shall be filed on ASAE's website, and the reporter should identify the infractor, all relevant facts and witnesses. In the

²⁶ Art. 28 of Decree-Law 560/99 of 18 December.

specific case of food poisoning, the individual reporting the breach must contact ASAE and immediately notify a health professional.²⁷

With respect to infringements of food advertising laws, complaints may be filed with ICAP identified above (a self-regulated private association), the Consumer's General Directorate (Direcção-Geral do Consumidor) or ASAE. Complaints filed by competitors or consumers consist in identifying the infringement, and the regulatory/supervising entities (such as ICAP and ASAE) will start the infringement procedure. Competitors and consumers may seek compensation for damages resulting from the infringement through civil liability actions.

2. Are there any national self-regulating bodies with respect to advertising for foodstuffs?

As mentioned above, ICAP (Civil Institute for Self-Regulation of Commercial Communication) is a self-regulating body in Portugal, which implements a self-regulating system that promotes legal, honest, truthful and adequate advertising. The majority of entities, including the Public Administration, recognize ICAP as an entity that defends the rights and interests of the civil society as well as of the industries, by promoting the credibility of advertisement speech and safeguarding the freedom of commercial expression. ICAP handles complaints from competitors, members and non-members, consumers, consumers associations, statutory bodies and other interested parties; however, the decisions are only binding for ICAP members. ICAP also provides a mediation service through a forum for the parties to meet and reach agreement about a contested advertisement.²⁸

27 Information available at <http://www.asae.pt/>.

28 Information available at http://www.icap.pt/icapv2/icap_site/index.php.



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