

# A Darker Shade of Pale: the never ending burden of advertising regulation

Ana Duarte Melo

[anamel@ics.uminho.pt](mailto:anamel@ics.uminho.pt)

**University of Minho, Portugal**

Helena Sousa

[hsousa@ics.uminho.pt](mailto:hsousa@ics.uminho.pt)

**University of Minho, Portugal**

## I. Introduction

Advertising innovative and creative nature leads to experiment and daring beyond settled boundaries, therefore constantly setting new challenges to regulation. In this paper we will reflect on the role of advertising as driver of its own normative structure the subjects that are matter of regulation, and the reasons that lead to that need. We will map ad regulation most common issues and analyse regulation mentions in professional media (Jan-Jul 2013).

## II. A Darker Shade of Pale: the never ending burden of advertising regulation

The pervasive nature of advertising – being one of the most influential institutions of contemporary western societies – and the uneasy ground where it acts – in the confluence of corporations, consumers and civil society interests – advertising tends to draw attention to ethic, deontological and regulatory matters.

On one hand, advertising is on the combat front of several opposite interests, self-defined by living (and making a living) on the edge of communication. By using creativity and persuasion as working tools, advertising is frequently accused of manipulation and unscrupulous operational methods, especially in the fields of behavioural, neural or subliminal advertising.

On the other hand, media ecology itself is currently under construction, with new boundaries being set and discovered as technology moves on into the everyday life, thus setting an ever renewed group of shadowy areas: internet, new media, private vs public space, mining/monitoring with/or without consent for advertising purposes, etc.

Furthermore, advertising uses elaborated persuasive technics to build on the power of assumed commercial and economic interests in a highly influential but simultaneously under permanent scrutiny communication network.

Being creative, innovative and persuasive, advertising is constantly setting new challenges to society and regulation, both format and content wise, operating as a driver of its own regulation through ever renewed territories and boundaries.

In order to better understand the concept of advertising regulation we will look at its implications through a four pillar approach: legislation, best practices, principles and the consumer-citizen perspective.

By legislation we imply the law in general and the advertising law in particular, with its specific codes that establish very specific rules to the advertising system and sometimes even stricter norm within certain subthemes, like tv, internet, or children advertising. But besides the norms specified in laws, codes and decrees we have to consider the possible interpretations of the law, its implementation conditions and, furthermore, supervision or the deterrent potential of applicable fines.

Other contributions for advertising regulation are the so-called best practices. They do not have the institutional power of a law, but they exert the pressure of a norm of conduct. Best practices often emerge amongst the industry advertisers – for instance, in Portugal all alcoholic drinks advertising have a mandatory inscription<sup>56</sup> that was implemented by the industry itself, through the advertisers association APAN - Associação Portuguesa de Anunciantes.

Concurrently, best practices originate in the milieu of advertising professional communities. The recently best practice code issued by APAP - Associação Portuguesa de Agências de Publicidade e Comunicação, to face unsustainable pitch contests is a good example. Furthermore, advertising agencies frequently develop specific *modus operandi* according to their own vision, mission or philosophy. These criteria and rules work as norms of conduct to deal with specific problems on the global scale of media corporations. To summarize, emerging amongst pairs, best practices originate in problem solving issues and mirror the social and deontological responsibility of the actors involved.

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<sup>56</sup> “Beba com moderação” - Drink moderately.

Generally advertising regulation is based on principles or, to put it in other words, in commonly accepted values. Although this perspective on regulation is prone to discussion – Julia Black (2010) argues that the financial crisis set up a crisis in principle based regulation (Black, 2010) and Hannu Nieminen (2013) identifies a shift in media regulation “favouring regulatory means formerly used mainly in the area of competition policy. By the same token, regulatory means based on democratic societal values have lost out” (Trivundža *et al.*, 2013:50). – most essential advertising regulation is based in principles.

Principles based regulation is seen by some as well intentioned but less effective rules prone to some ironic criticism.

“Ah, the good old days of advertising when you could simply tell bare-faced lies: ‘The cigarette that doctors recommend’, etc. Alas, those days are gone and in the UK we now have the Advertising Standards Authority (ASA) to keep us in line with their Committee of Advertising Practice (CAP) codes and their goody-two-shoes, Boy Scout motto: ‘Honest, decent, truthful and legal!’”(Bowdery, 2008:107)

In Portugal, four main principles are identified – and mentioned in the law – to frame the rationale of advertising regulation. According to these principles – lawfulness, identification, truth and respect for consumer rights – all advertising must follow all legal requirements; must be properly identified as commercial communication by opposition to information or entertainment; must be true or be based in truthful assumptions; and must respect consumers rights in all their specific rules.

Consumer-citizens are the other factor of this equation, particularly significant to what can be described as “acceptable advertising” (Harker, 1997) as it is their cultural values, expectations and demands that frame advertising regulation and the way it is acknowledged, complied to or rejected.

To a certain extent, more than the law is the practice that matters. Nevertheless “Regulation may be argued to be ‘less than law’ in functional terms” (Black, 2002:24), is the way law is interpreted and applied and the result of interactions between regulators and regulated institutions and actors, organized frequently in “private interest governments” (Streeck & Schmitter, 1985:20 *apud* Black, 2002:6), that determine the impact and the outcome of the whole regulation process.

Advertising regulation touches several regulatory frameworks, from market and competition to media regulation and communication rights. Furthermore it constitutes the structural reflection of the social, economic, political organization with all the pragmatic and ethical implications it involves: “Media regulation is a double, if not a multiply, edged sword” (Silverstone, 2008:176). And significantly some changes are becoming evident.

“(…) a shift has taken place in the regulation of the media and communication industries, favouring regulatory means formerly used mainly in the area of competition policy. By the same token, regulatory means based on democratic societal values

have lost out. Simultaneously, however, there is growing awareness that, because of the wider societal and cultural value of media and communications, regulation can no longer be based exclusively on economic goals. A new balance between democratic societal interest and economic need must be negotiated that does not disproportionately favour either side.” (Trivundža et al., 2013:50)

Advertising regulation deals with a set of recurrent questions mainly related with its *modus operandi*, format or content (see Table 1).

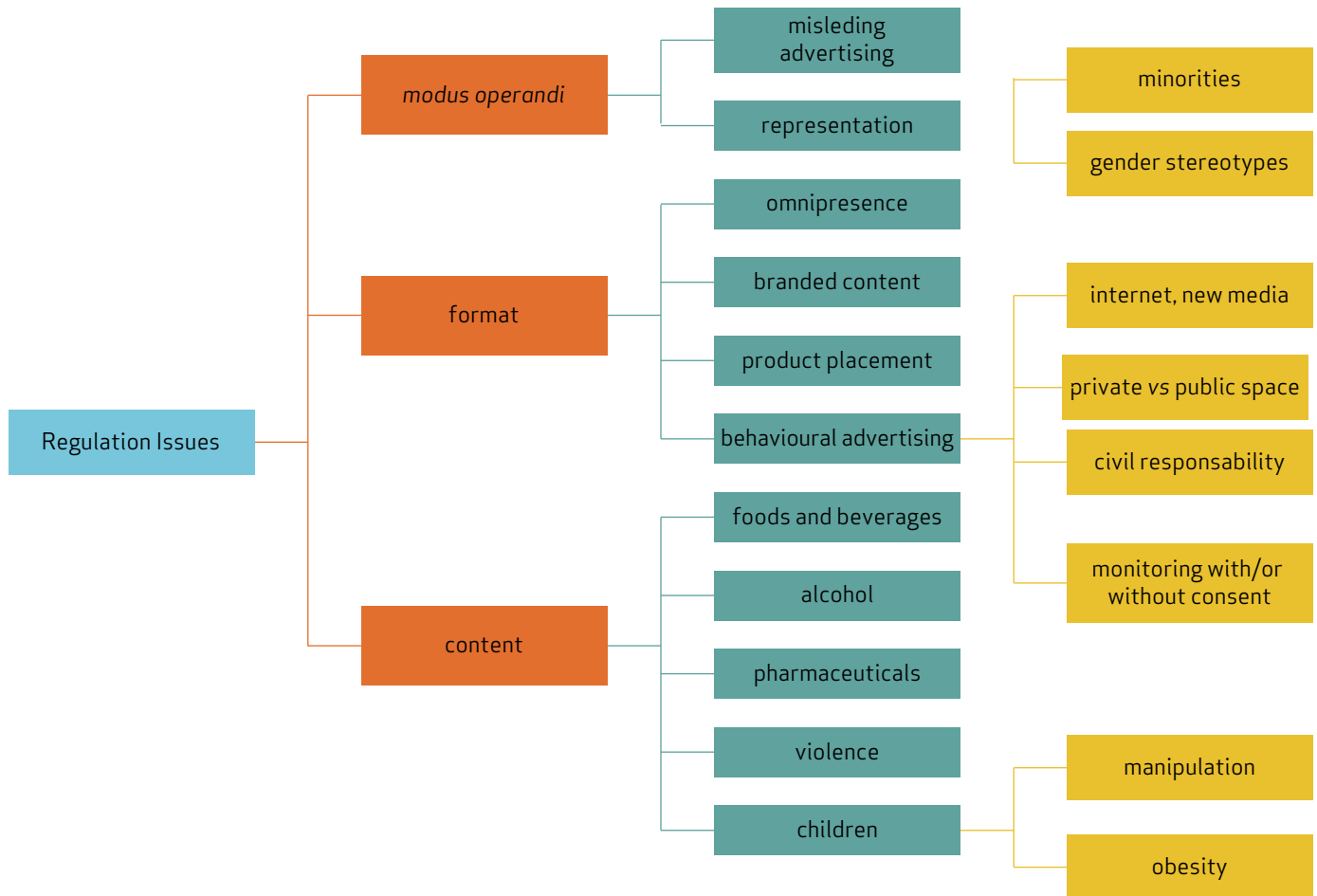


Table 1 - Ad regulation common issues map

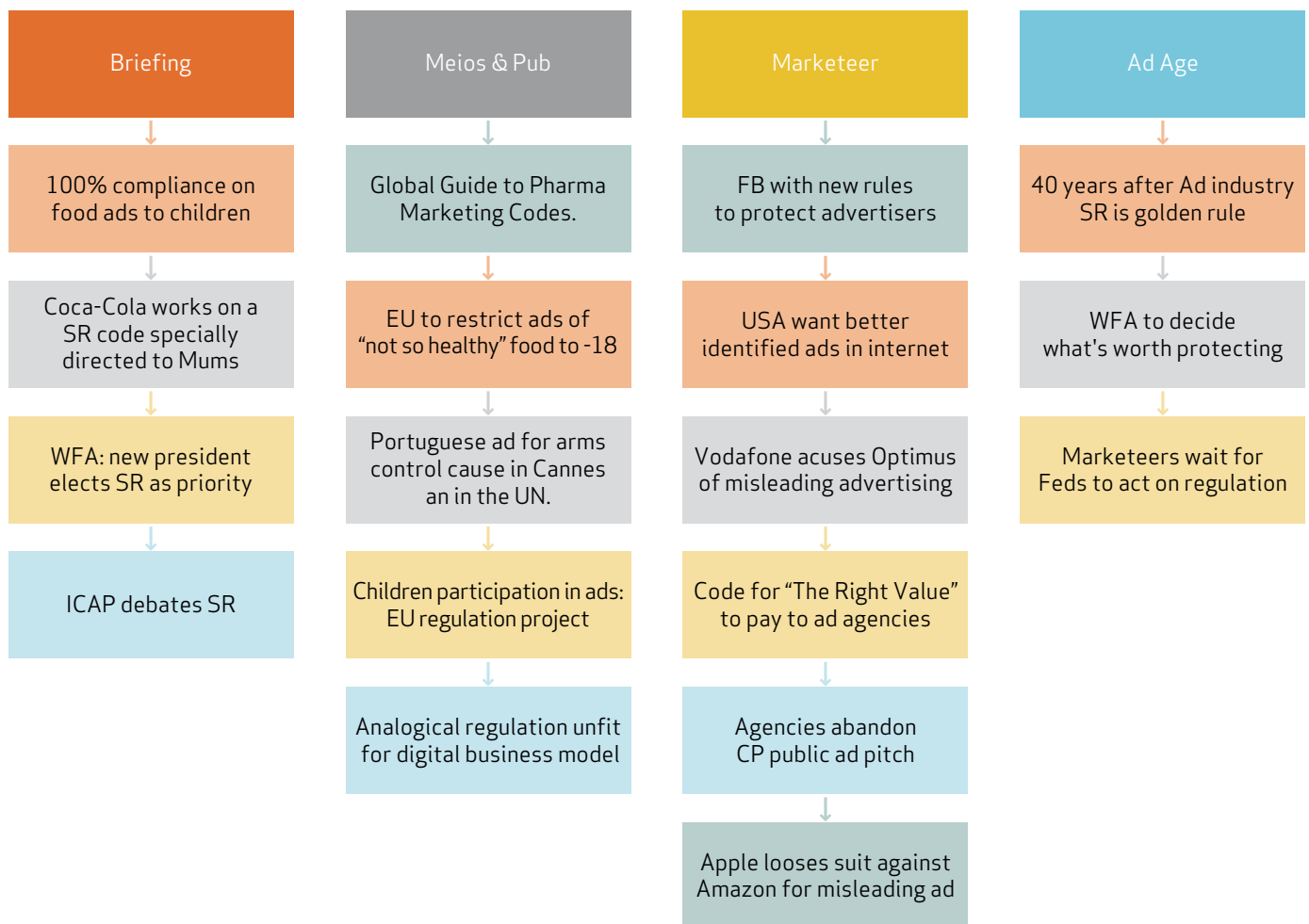
The *modus operandi* issues concern especially misleading advertising or representation problem like minorities or gender stereotypes.

The format related issues concern the omnipresence and pervasiveness of advertising, but also the blurring of boundaries with other types of communication. Amongst them branded content; product placement; behavioural advertising and its implications: internet, new media, private vs public space, civil responsibility, monitoring with/without consent.

Content matters tend to draw attention to a number of themes like violence, sex, health issues like tobacco or obesity, children related advertising or activity sectors: foods and beverages, alcohol and pharmaceuticals being some examples.

We analysed advertising regulations mentions in professional magazines – three Portuguese (Briefing, M&P, Marketeer) and Ad Age, the international advertising magazine – between January and July of 2013.

Our findings (Table 2) indicate that the traditional subjects are mentioned. Nevertheless, is also possible to identify some specific concerns, self-regulation being the main reference on regulation mentions.



**Table 2 - Ad regulation mentions in professional media (Jan-Jul 2013)** \*SR – Self Regulation; CP – Caminhos de Ferro Portugueses – Portuguese public railway company.

One of the ideas expressed focus on the need for regulation felt by advertisers themselves. This specific news relates with the absence of regulation over the use of the expression "Natural" in packaging products and advertising, leaving advertisers at the mercy of law litigation. The lack of a regulated definition of what can be considered 'nat-

ural', poses an important pragmatic problem and has been demanded by advertisers in the USA since 2007, but "FTC and FDA have refused to define "natural," leaving marketers open to suits."<sup>57</sup>

Advertising regulation is a reflection of the balance between different powers and interests and their evolution through social and cultural changes. This balance is not always easy and endures the commitment of different voices and sides. The fact that the recently appointed president of the World Federation of Advertisers, that represents 60 of the world's biggest advertisers and 90% of the global marketing-communication spending – \$700 billion/year, chose regulation as his inaugurating speech theme, seems to be significant of the relevance that regulation has in the advertising industry.

"We have to determine what's worth protecting in society in a way that allows marketers to do their jobs, but at the same time we have to listen to what is driving the arguments coming from legislators and regulators (...) All of us - business leaders, governments, regulators - in positions of responsibility have to take a step back and see where it's all leading, and that it's good for society. But it's going to be a debate, because none of us know."<sup>58</sup>

As much negotiation skills it demands, advertising regulation seems to be a relevant factor of sustainability in the not-always-so-straight path of advertising, demanding from all actors high ethical standards and leading responsibility.

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57 Adage, 11.3.13

58 Martin Riley, President of World Federation of Advertisers, ADAGE, 11.3.13

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