

Ministry of Economic Affairs and Innovation

Decree-Law No 57/2008 of 26 March

The development of fair commercial practices is vital to ensure consumer confidence in the market, to guarantee competition and to promote the development of cross-border commercial transactions.

This Decree-Law establishes a single general prohibition of those unfair commercial practices that distort consumers' economic behaviour, and applies to all unfair commercial practices, including unfair advertising, which directly harm consumers' economic interests and thereby indirectly harm the economic interests of legitimate competitors. It transposes into Portuguese law Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005, concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC of 10 September 1984, Directives 97/7/EC of the European Parliament and of the Council of 20 May 1997, 98/27/EC of the European Parliament and of the Council of 19 May 1998 and 2002/65/EC of the European Parliament and of the Council of 23 September 2002, and Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004.

The above general prohibition applies equally to unfair commercial practices that occur before, during and after any contractual relationship between a trader and a consumer. This general prohibition is combined with rules on the two most common types of unfair commercial practices: misleading commercial practices and aggressive commercial practices. The fair or unfair nature of a commercial practice is established by taking the average consumer as a reference.

This Decree-Law classifies misleading practices as misleading actions and misleading omissions. In respect of omissions, it sets out a limited number of key items of information which the consumer needs in certain cases to make an informed transactional decision.

The provisions relating to aggressive commercial practices cover those practices which significantly restrict the consumer's freedom of choice. Those are practices using harassment, coercion, including the use of physical force, and undue influence.

This Decree-Law is not intended to prohibit advertising practices involving the use of clearly exaggerated statements or statements that are not meant to be taken literally.

It establishes which persons or organisations have a legitimate interest in taking action against unfair commercial practices either before a court or before an administrative authority which is competent to decide upon complaints or to initiate the relevant legal proceedings.

For the purposes of the application of this Decree-Law, the *Autoridade de Segurança Alimentar e Económica* (Food and Economic Safety Authority) or the regulatory body covering the sector in question shall be considered to be the competent administrative authorities. If the unfair commercial practice is in the area of advertising the competent administrative authority shall be the Directorate-General for Consumer Affairs.

Likewise, the *Banco de Portugal*, the *Comissão do Mercado de Valores Mobiliários* (Securities Market Commission) and the *Instituto de Seguros de Portugal* (Portuguese

Insurance Institute) shall be considered as the competent administrative authorities for unfair commercial practices that occur within the respective financial sectors.

The abovementioned administrative authorities can order the temporary cessation of an unfair commercial practice as a precautionary measure, or prohibit an imminent unfair commercial practice before it is carried out.

This Decree-Law shall not apply to provisions relating to the certification and indication of the standard of fineness of articles of precious metal and the rules laid down herein shall be complementary or residual in relation to other sectoral provisions regulating these commercial practices, ensuring, furthermore, the protection of consumers in cases where there is no specific sectoral legislation.

Departments of the governments of the Autonomous Regions have been consulted.

The National Consumer Council was consulted.

The following were consulted on an optional basis: the *Associação Portuguesa para a Defesa do Consumidor* (Portuguese Consumer Protection Association), the *União Geral de Consumidores* (General Consumers' Union), the *Federação Nacional das Cooperativas de Consumidores* (National Federation of Consumer Cooperatives), the *Associação dos Consumidores da Região Autónoma dos Açores* (Consumer Association of the Autonomous Region of the Azores), the *Associação de Consumidores de Média* (Association of Media Users) and the *Confederação do Comércio e Serviços de Portugal* (Portuguese Business and Services Confederation). The *Banco de Portugal*, the *Instituto de Seguros de Portugal* and the *Comissão do Mercado de Valores Mobiliários* were also consulted.

Accordingly:

In accordance with Article 198(1)(a) of the Constitution, the Government decrees as follows:

## CHAPTER I

### Unfair Commercial Practices

#### Article 1

#### **Purpose**

This Decree-Law lays down the legal rules applicable to unfair business-to-consumer commercial practices that occur before, during or after a commercial transaction for a product or service, transposing into Portuguese law Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005, concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC of 10 September 1984, Directives 97/7/EC of the European Parliament and of the Council of 20 May 1997, 98/27/EC of the European Parliament and of the Council of 19 May 1998 and 2002/65/EC of the European Parliament and of the Council of 23 September 2002, and Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004.

## Article 2

### Scope

1 — This Decree-Law is without prejudice to the application of national provisions stemming from Community rules regulating specific aspects of unfair commercial practices, such as information requirements and rules on the way the information is presented to the consumer.

2 — Notwithstanding the provisions of Article 14, this Decree-Law does not affect the rules governing the formation, validity or effects of contracts.

3 — The rules laid down in this Decree-Law are without prejudice to any more stringent rules relating to the protection of health and the safety of goods or services, financial services or immovable properties.

## Article 3

### Definitions

For the purposes of this Decree-Law, the following definitions shall apply:

a) “consumer” means any natural person who, in commercial practices covered by this Decree-Law, is acting for purposes which are outside his trade, business, craft or profession;

b) “trader” means any natural or legal person who, in commercial practices covered by this Decree-Law, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader;

c) “product” means any goods or service including immovable property, rights and obligations;

d) “business-to-consumer commercial practices, or commercial practices for short” means any act, omission, course of conduct or representation by a trader, including advertising and marketing, directly connected with the promotion, sale or supply of goods or services to a consumer;

e) “to materially distort the economic behaviour of consumers” means carrying out a commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise;

f) “code of conduct” means an agreement or set of rules not imposed by law, regulation or administrative provision which defines the behaviour of traders who undertake to be bound by the code in relation to one or more particular commercial practices or business sectors;

g) “code owner” means any entity, including a trader or group of traders, which is responsible for the formulation and revision of a code of conduct and/or for monitoring compliance with the code by those who have undertaken to be bound by it;

h) “professional diligence” means the standard of special skill and care which a trader may reasonably be expected to exercise in his relations with consumers, commensurate

with honest market practice and/or the general principle of good faith in the trader's activity;

i) "invitation to purchase" means a commercial communication which indicates characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enables the consumer to make a purchase;

j) "undue influence" means exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer's ability to make an informed decision;

l) "transactional decision" means any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting;

m) "regulated profession" means a professional activity or a group of professional activities, access to which or the pursuit of which, or one of the modes of pursuing which, is conditional, directly or indirectly, upon possession of specific professional qualifications, pursuant to laws, regulations or administrative provisions.

#### Article 4

### **Prohibition**

Unfair commercial practices shall be prohibited.

#### Article 5

### **Unfair commercial practices in general**

1 — A commercial practice shall be regarded as unfair if it does not conform to professional diligence, materially distorts or is likely to materially distort the economic behaviour of the consumer to whom it is addressed or whom it affects regarding particular goods or services.

2 — The fair or unfair nature of a commercial practice is determined by taking as a reference the average consumer, or the average member of a group when the commercial practice is addressed to a particular group of consumers.

#### Article 6

### **Specific unfair commercial practices**

The following are more specifically unfair:

a) commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the commercial practice or the underlying product or service because of their mental or physical infirmity, age or credulity, if the trader could reasonably have foreseen that his conduct was likely to result in such distortion;

b) the misleading commercial practices and the aggressive commercial practices referred to in Articles 7, 9 and 11;

c) the misleading commercial practices and the aggressive commercial practices referred to in Articles 8 and 12 respectively, which shall be considered as such under any circumstances.

## Article 7

### **Misleading actions**

1 — A commercial practice shall be regarded as misleading if it contains false information or information that, even if factually correct, deceives or is likely to deceive the average consumer for any reason, including overall presentation, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise:

- a) the existence or nature of the goods or service;
- b) the main characteristics of the goods or service, such as availability, benefits, risks, execution, composition, accessories, after-sale customer assistance and complaint handling, method and date of manufacture or provision, delivery, fitness for purpose and guarantees of conformity, usage, quantity, specification, geographical or commercial origin or the results to be expected from its use, or the results and material features of tests or checks carried out on the goods or service;
- c) the content and extent of the trader's commitments, the motives for the commercial practice and the nature of the sales process and the use of any statement or symbol indicating direct or indirect sponsorship or approval of the trader or the goods or service;
- d) the price, the manner in which the price is calculated or the existence of a specific price advantage;
- e) the need for the provision of a service or a part, or for the replacement or repair of the goods;
- f) the nature, attributes and rights of the trader or his agent, such as his identity and assets, his qualifications, fulfilment of the requirements for access to the activity, status, affiliation or connection and ownership of industrial, commercial or intellectual property rights, or his awards and distinctions;
- g) the consumers' rights, particularly to replacement, repair, reduction of the price or cancellation of the contract in accordance with the rules applicable to the conformity of consumer goods, and the risks to which the consumer may be exposed.

2 — Taking account of all of the characteristics and circumstances of the specific case, a commercial practice shall be considered misleading if it involves:

- a) any commercial activity promoting goods or services, including comparative advertising, which creates confusion with any goods or services, trade marks, trade names or other distinguishing marks of a competitor;
- b) the failure by the trader to comply with the effective undertaking derived from the code of conduct to which he is bound if he has stated during the commercial practice that he is bound by the said code.

## Article 8

## **Actions which are in all circumstances considered misleading**

The following commercial practices shall be considered misleading in all circumstances:

- a) claiming to be a signatory to a code of conduct when this is not the case;
  - b) displaying a certification mark, quality mark or equivalent without having obtained the necessary authorisation;
  - c) claiming that a code of conduct has an endorsement from a public or other body which it does not have;
  - d) claiming that a trader, including his commercial practices, or a product or service have been approved, endorsed or authorised by a public or private body when he/it has not or making such a claim without complying with the terms of the approval, endorsement or authorisation;
  - e) making an invitation to purchase goods or service at a price lower than that offered on the market by other suppliers or service providers while knowing, or not being able to ignore, that he is not in a position to fulfil the offer, and not having available, or not stating who has available under the same conditions and at a similar degree of accessibility for the consumer, sufficient quantities of stock, for a period of time compatible with foreseeable demand in view of the volume and means of publicity carried out concerning the goods or service in question and the price indicated;
  - f) making an invitation to purchase goods or services at a specified price and then, with the aim of promoting different goods or services, refusing to supply consumers with the goods or service advertised;
  - g) refusing to take orders for this good or service or to deliver or supply it within a reasonable time;
- or
- h) demonstrating a defective sample or demonstrating it in an insufficient manner;
  - i) falsely stating that goods or services are only available for a very limited time, or that they are only available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice;
  - j) undertaking to provide after-sales service in a language, used for communication prior to the transaction, that is not an official language of the Member State where the trader is located and then making such service available only in a different language, without the trader clearly disclosing this to the consumer before the consumer has made a commitment;
  - l) stating or otherwise creating the impression that goods can legally be sold or purchased or that a service can legally be provided when this is not the case;
  - m) presenting as a distinctive feature of the trader's offer rights given to consumers in law;

- n) using editorial content in the media to promote goods or services where a trader has paid for the promotion, when this is not made clear in the content or indicated by images or sounds clearly identifiable by the consumer;
- o) making a materially inaccurate claim concerning the nature and extent of the risk to the personal security of the consumer or his family if the consumer does not purchase the goods or agree to the provision of the service;
- p) promoting goods or services similar to those made or offered by a particular manufacturer in such a manner as deliberately to mislead the consumer into believing that the goods or services come from that same manufacturer when this is not the case;
- q) without prejudice to the provisions of Decree-Laws Nos 240/2006, of 22 December, 172/2007, of 8 May, and 81/2006, of 20 April, rounding up prices, periods of time or other factor directly or indirectly related to the supply of the goods or provision of the service when this has no exact and direct relation to its effective cost or use made by the consumer and which results in an increase in the price to be paid by him;
- r) establishing, operating or promoting a pyramid promotional scheme where a consumer gives consideration for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme;
- s) claiming that the trader is about to cease trading or move premises when he is not;
- t) claiming that the goods or services are able to facilitate winning in games of chance;
- u) falsely claiming that goods or services are able to cure illnesses, dysfunction or malformations;
- v) passing on materially inaccurate information on market conditions or on the possibility of finding the goods or service with the intention of inducing the consumer to acquire the goods or conclude a contract for the provision of the service at conditions less favourable than normal market conditions;
- x) claiming to offer a competition or prize promotion without awarding the prizes described or a reasonable equivalent;
- z) describing goods or service as “gratis”, “free”, “without charge” or similar if the consumer has to pay anything other than the strictly necessary cost of responding to the commercial practice and collecting or paying for delivery of the item;
- aa) including in marketing material an invoice or similar document seeking payment which gives the consumer the impression that he has already ordered the marketed goods or services when he has not;
- ab) falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer;
- ac) creating the false impression that after-sales service in relation to goods or services is available in a Member State other than the one in which the goods or services are sold.

#### Article 9

#### **Misleading omissions**

1 — Taking account of all its features and circumstances and the limitations of the medium of communication, a commercial practice shall also be regarded as misleading, and therefore causing or likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, if:

a) it omits material information that the consumer needs to take an informed transactional decision;

b) a trader hides or provides in an unclear, unintelligible or untimely manner such information as referred to in the previous paragraph;

c) a trader fails to identify the commercial intent of the commercial practice, if this is not already apparent from the context.

2 — Where the communications medium used for the commercial practice imposes limitations of space or time, these limitations and any measures taken by the trader to make the information available to consumers by other means must be taken into account to determine whether information has been omitted.

3 — The information required for commercial communications in national legislation derived from Community law shall be considered as material information.

4 — For the purposes of the previous paragraph, the following in particular shall be taken into account:

a) Decree-Law No 138/90, of 26 April, laying down the legal regulations relating to the obligation to display the prices of goods or services;

b) Decree-Law No 359/91, of 21 September, laying down the legal regulations on consumer credit;

c) Decree-Law No 275/93, of 5 August, laying down the legal regulations governing timeshares in units of accommodation within aparthotels, tourist villages and tourist apartments;

d) Decree-Law No 94-B/95, of 17 April, laying down the legal regulations governing the conditions of access to and exercise of the activity of insurer or reinsurer in the European Community;

e) Decree-Law No 209/97, of 13 August, laying down the legal regulations relating to the access to and activities of tourism and travel agencies;

f) Decree-Law No 486/99, of 13 November, adopting the Securities Code;

g) Decree-Law No 143/2001, of 26 April, laying down the legal regulations on distance selling;

h) Decree-Law No 252/2003, of 17 October, laying down the legal regulations relating to management companies and simplified prospectuses for collective investment in transferable securities;

i) Decree-Law No 7/2004, of 7 January, laying down the legal regulations on electronic commerce;



j) Decree-Law No 52/2006, of 15 March, laying down the legal regulations relating to the abuse of privileged information and manipulation of the market in publication and access to negotiation of prospectuses for the public sale of transferable securities;

l) Decree-Law No 95/2006, of 29 May, laying down the legal regulations on distance selling of financial services provided to consumers;

m) Decree-Law No 144/2006, of 31 July, laying down the legal regulations on insurance mediation;

n) Decree-Law No 176/2006, of 30 August, laying down the legal regulations on medicinal products for human use; and

o) Decree-Law No 357 -A/2007, of 31 October, transposing into Portuguese law Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments.

## Article 10

### **Contractual offer and invitation to purchase**

In the case of a contractual offer and invitation to purchase, the following information shall be regarded as material for the purposes of the preceding article, if not already apparent from the context:

a) the main characteristics of the goods or service, to an extent appropriate to the medium and the goods or service;

b) the geographical address, identity and trading name of the trader and, where applicable, the geographical address, identity and trading name of the trader on whose behalf he is acting;

c) the price inclusive of taxes, or where the nature of the product or service means that the price cannot reasonably be calculated in advance, the manner in which the price is calculated, as well as, where appropriate, all additional freight, delivery or postal service charges or, where these charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable;

d) the arrangements for payment, delivery or performance and the complaint handling policy, insofar as they depart from the requirements of professional diligence;

e) the existence of rights of withdrawal or cancellation, whatever the terminology used, whenever these are derived from the legislation or from the contract.

## Article 11

### **Aggressive commercial practices**

1 — A commercial practice shall be regarded as aggressive if, by harassment, coercion or undue influence, it impairs or is likely to significantly impair the consumer's freedom of choice or conduct with regard to a product or service and thereby causes or is likely to cause him to take a transactional decision that he would not have taken otherwise.

2 — For the purposes of the previous paragraph, and in the light of the specific case and all of the characteristics and circumstances thereof, the following aspects must be taken into consideration:

- a) the time, location, nature and persistence of the commercial practice;
- b) the use of threatening or abusive language or behaviour;
- c) the deliberate exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgement, in order to influence his decision with regard to the goods or service;
- d) any onerous or disproportionate non-contractual barriers imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate a contract, exchange for different goods or service or switch to another trader;
- e) any threat to take court action that cannot legally be taken.

#### Article 12

#### **Commercial practices, which are in all circumstances considered aggressive**

The following commercial practices shall be considered aggressive in all circumstances:

- a) creating the impression that the consumer cannot leave the premises until a contract is concluded;
- b) conducting personal visits to the consumer's home ignoring the consumer's request to leave or not to return, except in circumstances and to the extent justified for compliance with a contractual obligation;
- c) making persistent and unwanted solicitations by telephone, fax, e-mail or other remote media except in circumstances and to the extent justified for compliance with a contractual obligation;
- d) requiring a consumer who wishes to claim on an insurance policy to produce documents which could not reasonably be considered relevant to establish the validity of the claim, or failing systematically to respond to pertinent correspondence, in order to dissuade a consumer from exercising his contractual rights;
- e) including in an advertisement a direct exhortation to children to buy or persuade their parents or other adults to buy the advertised goods or services for them;
- f) demanding immediate or deferred payment for goods and services or the return or safekeeping of products supplied by the trader, but not solicited by the consumer, notwithstanding the provisions of the rules governing distance contracts concerning the possibility of supplying the goods or services of equivalent quality and price;
- g) explicitly informing a consumer that if he does not buy the goods or conclude a contract for the service, the trader's job or livelihood will be in jeopardy;
- h) creating the false impression that the consumer has already won, will win, or will on doing a particular act win a prize or other equivalent benefit, when in fact there is no prize or other equivalent benefit or taking any action in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost.

## Article 13

### **Dispatch of unsolicited goods or services**

1 — In the event of dispatch of goods or services that were not ordered or solicited, which does not constitute fulfilment of any valid contract, the recipient of these goods or services shall not be required to return or pay for them and shall be allowed to keep them free of charge.

2 — The absence of a response from the recipient does not constitute consent under the terms of the previous paragraph.

3 — If, notwithstanding the provisions of the previous paragraphs, the recipient returns the goods, he shall be entitled to be reimbursed the cost of the return within 30 days of return.

## Article 14

### **Invalidity of contracts**

1 — Contracts concluded under the influence of any unfair commercial practice may be annulled at the consumer's request in accordance with Article 287 of the Civil Code.

2 — The consumer may request that the contract be amended in accordance with principles of fairness instead of being annulled.

3 — If only one or more terms of the contract are invalid the consumer may choose to maintain the contract, reduced to its valid content.

## Article 15

### **Civil liability**

Any consumer harmed by the effect of any unfair commercial practice prohibited under this Decree-Law shall be compensated under general terms.

## Article 16

### **Right of action**

Any person, including competitors with a legitimate interest in opposing unfair commercial practices under the terms of this Decree-Law, may seek an injunction in accordance with Law No 24/96, of 31 July, in order to prevent, rectify or put a stop to these practices.

## CHAPTER III

### **Codes of conduct**

## Article 17

### **Control by owners of codes of conduct**

1 — Owners of codes of conduct that guarantee a higher level of consumer protection than that provided for in this Decree-Law can control the unfair commercial practices identified herein.

2 — The exercise of controls by code owners shall not imply foregoing legal action or administrative controls.

## Article 18

### **Illegal codes of conduct**

The owner of a code of conduct of which the content results in failure to comply with the provisions of this Decree-Law shall be subject to the provisions of Articles 15, 16, 20 and 21.

## CHAPTER III

### **System of penalties**

## Article 19

### **Competent administrative authorities**

1 — The administrative authority competent to order the measures provided for in the following article is the *Autoridade de Segurança Alimentar e Económica* (ASAE, Food and Economic Safety Authority) or the regulatory body in the sector in which the unfair commercial practice occurs.

2 — The *Banco de Portugal*, the *Comissão do Mercado de Valores Mobiliários* (Securities Market Commission) and the *Instituto de Seguros de Portugal* (Portuguese Insurance Institute) are considered as the administrative authorities competent to apply the provisions of this Article to unfair commercial practices that occur within the respective financial sectors.

3 — For unfair commercial practices in the area of advertising, the administrative authority competent to apply the provisions of the following article is the Directorate-General for Consumer Affairs (DGC), which can request the involvement of the ASAE for the effective performance of its task.

4 — The competent authorities and services are required to cooperate with the administrative authorities referred to in previous paragraphs in all aspects necessary for fulfilment of the tasks resulting from the application of this Decree-Law.

5 — Traders must provide the competent administrative authorities with all of the cooperation necessary for the fulfilment of their tasks.

## Article 20

### **Specification of the precautionary measures**

1 — Without prejudice to the provisions of Article 16, any person, including competing traders, with a legitimate interest in opposing the unfair commercial practices prohibited under this Decree-Law may bring the matter to the attention of the competent administrative authority using any means at his disposal.

2 — The administrative authority can order the temporary cessation of an unfair commercial practice as a precautionary measure, or prohibit an imminent unfair commercial practice before it is carried out, independently of the degree of responsibility or the evidence that real harm has been caused.

3 — The application of precautionary measures as referred to above is subject to prior assessment of the extent to which it is foreseeable that an unfair commercial practice could occur.

4 — The adoption of precautionary measures as referred to in paragraph (2) above must, wherever possible, be preceded by a hearing of the trader, who will be given three working days for this purpose following notification, using any method, by the competent administrative authority.

5 — The hearing provided for in the preceding paragraph shall not take place when:

- a) the decision is urgent;
- b) it can reasonably be foreseen that the procedure could compromise the application or usefulness of the decision;
- c) the number of persons involved to be heard is so high that the hearing becomes unfeasible. In this case, and whenever possible, a public consultation should be organised using the most appropriate method.

6 — The measure ordered in accordance with paragraph (2) shall lapse at the end of the period stipulated within, should this precede the final decision handed down by the competent administrative authority in the context of the relevant infringement proceedings or by the competent court on appeal.

7 — Appeals against the measure adopted by the administrative authority shall be referred to the court of the area where the unfair commercial practice occurred.

## Article 21

### **Infringement procedures**

1 — Any violation of the provisions of Articles 4 to 12 constitutes an infringement liable to a fine ranging from €250 to € 740.98 for natural persons and from € 000 to €4 891.81 for legal persons.

2 — Depending on the seriousness of the infringement and the degree of responsibility of the offender, the following additional penalties shall also apply:

- a) seizure of property belonging to the offender;
- b) ban from exercising professions or activities requiring certification, authorisation or approval by public authorities;
- c) closure of premises the operation of which is subject to a permit or licence issued by a public government authority;
- d) publication of the imposition of fines and additional penalties at the offender's expense.

3 • The sanctions referred to in sub-paragraphs a) to c) of the preceding paragraph shall be imposed for a maximum period of two years from the date on which the sentence becomes final.

4 — Negligence is always subject to penalties, with the upper and lower limits of the fines reduced by half.

5 — The ASAE or the administrative authority competent for the matter in question in accordance with Article 19 shall be responsible for monitoring compliance with this Decree-Law and for handling the corresponding infringement proceedings.

6 — The body referred to in the corresponding sectoral regulations or, where no such body exists, the *Comissão de Aplicação das Coimas em Matéria Económica e de Publicidade* (CACMEP, Advertising Fines Enforcement Committee), shall be responsible for imposing the fines.

7 — The amount of the fines imposed is distributed in accordance with the terms laid down in the corresponding sectoral regulations or, where these do not exist, as follows:

a) 60% to the State;

b) 30 % to the body handling the case;

c) 10 % to the body referred to in the corresponding sectoral regulations or, where no such body exists, to CACMEP.

## Article 22

### **Evidence**

1 — The competent courts and administrative authorities can require traders to furnish evidence of the material accuracy of the facts contained in the commercial practices regulated in this Decree-Law if, taking into account the legitimate interest of the trader and any other party to the proceedings, such a requirement is appropriate to the circumstances of the case.

2 — Facts shall be considered as inaccurate if the evidence demanded in accordance with the previous numbered paragraph is not furnished or is deemed insufficient by the court or administrative authority.

## CHAPTER IV

### **Final Provisions**

## Article 23

### **Amendment to the Advertising Code**

Articles 11 and 16 of the Advertising Code, adopted by Decree-Law 330/90, of 23 October, shall be reworded as follows:

“Article 11

### **Misleading advertising**

1 — All advertising considered misleading in accordance with Decree-Law No 57/2008, of 26 March, on unfair business-to-consumer commercial practices, is prohibited.

2 — In the circumstances provided for in the preceding paragraph, the body competent to handle the respective infringement proceedings can require traders to furnish evidence of the material accuracy of the facts contained in the advertising.

3 — The facts referred to in the preceding paragraph shall be deemed inaccurate if the evidence required is not furnished or is insufficient.

4 — *(Repealed.)*

5 — *(Repealed.)*

## Article 16

### **Comparative advertising**

1 — .....

2 — .....

a).....

b).....

c).....

d) does not create confusion in the market place between traders, between the advertiser and a competitor or between the advertiser's trade marks, trade names, other distinguishing marks, goods or services and those of a competitor;

e).....

f).....

g).....

h).....

3 — .....

4 — .....

5 — .....”

## Article 24

### **Addition to the Advertising Code**

The Advertising Code, adopted by Decree-Law 330/90, of 23 October, shall be amended by the addition of Articles 42 and 43, worded as follows:

“Article 42

### **Legitimacy of traders and competitors to act**

Any trader or competitor with a legitimate interest in fighting misleading advertising and ensuring compliance with the provisions on comparative advertising can request the

involvement of the Directorate-General for Consumer Affairs for the purposes of the preceding article.

#### Article 43

##### **Communication addressed exclusively to traders**

The provisions of Articles 10, 11 and 16 of this Code apply only to advertising that is not addressed to consumers.”

#### Article 25

##### **Evaluation of the Implementation of the Decree-Law**

At the end of the third year from the entry into force of this Decree-Law, and biannually in subsequent years, the DGC, based on information supplied by the ASAE and by the other competent administrative authorities and on information derived from its activities, shall draw up and present an evaluation report on the application and implementation of the said Decree-Law, to be submitted to the member of the Government responsible for consumer protection policy.

#### Article 26

##### **Autonomous Regions**

The provisions of this Decree-Law apply to the Autonomous Regions of the Azores and Madeira, without prejudice to the responsibilities conferred on State Government departments or bodies and exercised by the corresponding departments and bodies of the regional administrations with identical attributions and responsibilities.

#### Article 27

##### **Repeal clause**

The following shall be repealed:

- a) Article 11(4) and (5) and Article 22-B of the Advertising Code, adopted by Decree-Law 330/90, of 23 October:
- b) Articles 26, 27, 28 and 29 of Decree-Law No 143/2001, of 26 April.

#### Article 28

##### **Entry into force**

This Decree-Law shall enter into force on the first working day of the month following its publication.

Seen and approved in the Council of Ministers of 31 January 2008. — José Sócrates Carvalho Pinto de Sousa — Luís Filipe Marques Amado — Fernando Teixeira dos Santos — Manuel António Gomes de Almeida de Pinho — Alberto Bernardes Costa.

Promulgated on 14 March 2008.

For publication.



The President of the Republic, ANÍBAL CAVACO SILVA.

Countersigned on 17 March 2008.

The Prime Minister, José Sócrates Carvalho Pinto de Sousa.