

ITALY



MINISTRY OF FOREIGN AFFAIRS
Inter-ministerial Committee for Human Rights

*Italy's contribution in relation to the request of the
Special Rapporteur in the field of cultural rights on the
impact of advertising and marketing practices on the
enjoyment of cultural rights
(HRC Resolution 19/6)*

June 2014



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Further to your query, Italian Authorities are in a position to provide the following information.

Question n. 1.

Has your country adopted specific regulations on advertising and marketing methods and contents aimed at protecting human rights? If so, please specify the content of such regulation. Does the regulation apply both to off-line and on-line advertising?

Answer n. 1.

Italian law has provided for at least two different specific regulations on advertising and marketing methods to protect human and cultural right.

(a) Media services law. Article 2 par. 1 lit. d) (legislative decree n. 177 dated 31th July 2005, entitled “Decree on the implementation into national law of the EU Audiovisual Media Services Directive”, hereinafter TUSMAR) lays down that “audiovisual commercial communication” means “images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity and including television advertising, sponsorship, teleshopping and product placement; such images accompany or are included in a programme in return for payment or for similar consideration or for self-promotional purposes”. TUSMAR applies at the same time to audiovisual media service both linear [as defined at article 2 par. 1 lit. i)] and non-linear [as defined at article 2 par. 1 lit. m)]. Therefore TUSMAR applies also to different ways for viewing the programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider. The definition of audiovisual commercial communication applies therefore to the ones broadcasted by audiovisual media service both linear and non-linear; this definition applies therefore to many different modalities of advertising, also on line.

The article 36 bis par. 1 b) TUSMAR (article 36a. par. 1 b) is entitled “General principles on the subject of radio and audiovisual commercial communications”. According to this rule, audiovisual commercial communications broadcasted by media services providers under Italian jurisdiction shall respect the following regulations: (i) to be readily recognisable as such; surreptitious audiovisual commercial communication shall be prohibited: (ii) do not use subliminal techniques; (iii) do not prejudice respect for

human dignity; (iv) do not include or promote any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation; (v) do not encourage behaviour prejudicial to health or safety; (vi) do not encourage behaviour grossly prejudicial to the protection of the environment; and (vii) do not cause physical or moral detriment to minors.

With regard to teleshopping, that is a particular form of advertising, article 40 par. 1 TUSMAR shall be prohibited teleshopping that offends human dignity, incites discrimination on grounds of race, sex or nationality, offends religious and political beliefs, or encourages behaviour prejudicial to health or safety or to the protection of the environment.

(b) Italian law concerning unfair business-to-consumer commercial practices. Also the self-determination of the consumer in his commercial choices (a natural person who, in commercial practices is acting for purposes which are outside his trade, business or profession) can be considered *lato sensu* as a human right. In this regard according to article 20 par. 2 of the Consumer Code (legislative decree n. 206, dated 6 September 2005) a commercial practice shall be unfair if it is contrary to the requirements of professional diligence, and it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.

Question n. 2.

Please indicate whether specific categories of the population are protected by such regulation, such as children, women, minorities and indigenous peoples.

Answer n. 2.

Some specific rules lay down an “enhanced” protection for specific categories of the population, such as children and teenagers. They protect minors between 16.00 and 19.00 p.m. and regulate programs directly addressed to children, especially about advertisements, promotions and other forms of audiovisual commercial communication.

The aim of these rules is to pay attention to healthy social and emotional development of children. Television programs and spot must not take advantage of children’s tendency to imitate what they see.

Certainly, alcohol and tobacco advertising are the most highly regulated forms of marketing.

Also in this case Italian law has provided for at least two different specific regulations.

(a) Media services law.

According to article 36 bis par. 1 lit. b) TUSMAR, in particular: (i) audiovisual commercial communications for alcoholic beverages shall not be aimed specifically at minors and shall not encourage immoderate consumption of such beverages; (ii) they shall not exhort minors to buy or hire a product or service by exploiting their inexperience or credulity, encourage them to persuade their parents or others to purchase the goods or services being advertised, exploit the special trust minors place in parents, teachers or other

persons, or unreasonably show minors in dangerous situations. With regard to the following article 37 lays down more detailed rules and in particular: (i) the transmission of children's programmes may be interrupted by television advertising or teleshopping once for each scheduled period of at least 30 minutes, provided that the scheduled duration of the programme is greater than 30 minutes; (ii) television advertising and teleshopping for alcoholic beverages shall comply with the following criteria: (a) it may not be aimed specifically at minors or, in particular, depict minors consuming these beverages; (b) it shall not link the consumption of alcohol to enhanced physical performance or to driving; (c) it shall not create the impression that the consumption of alcohol contributes towards social or sexual success.

Also with regard to teleshopping article 40 par. 2 TUSMAR lays down that this particular form of advertising must not exhort minors to enter into contracts for the purchase or rental of products or services. Teleshopping must not cause moral or physical detriment to minors. Then, teleshopping must respect the following criteria for their protection: (i) shall not directly exhort minors to buy or hire a product or service by exploiting their inexperience or credulity; (ii) shall not directly exhort minors to persuade parents or others to purchase such products or services; (iii) shall not exploit the special trust minors place in parents, teachers or others; (iv) shall not unreasonably show minors in dangerous situations.

(b) Italian law concerning unfair business-to-consumer commercial practices. With regard to the more general protection against misleading advertising, the Consumer Code lays down that 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 practice also because of their age (article 20 par. 3). The "vulnerability" in respect of age therefore allows to configure also in this case a protection "enhanced" with respect to the ordinary rules for children and adolescents. Similarly to TUSMAR, other more detailed rules prohibit, then, in particular commercial practices that, reaching children and teenager, could be also indirectly threaten their safety (article 21 par. 4); and commercial practices including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them (article 26 par. 1 lit. e).

Self-regulation specify additional rules to protect children.

The "Self-regulation code on TV and minors" (2002) has been subscribed by major broadcaster. The "Advertising self-regulation code" (1966) bind companies that invest in advertising or entering into a contract for advertising. It includes rules about advertising "unhealthy" food and drinks in children's programs.

Question n. 3.

Is advertising covered by the general provisions on freedom of expression and/or does your country differentiate between commercial speech and non-commercial speech? Do specific regulations distinguish between advertising and other contents, and if so, which are the criteria used to make this distinction?

Answer n. 3.

The uniform line of precedent of Italian Constitutional Court tends to consider commercial advertising as a component of economic activity of enterprises and thus leads it to the guarantee of freedom of private economic initiative foreseen in article 41 of Italian Constitution; this freedom has distinguished quite clearly

from the expression of thought one, whose is guaranteed by article 21 of Italian Constitution (e.g. see the judgment of the Court 17 October 1985 n. 231). The constitutional protection of freedom of expression generally refers to forms of communication that in any way pertain to the field of information, opinion and culture and will therefore have not a direct economic purpose. The protection of commercial communications through the freedom of private economic initiative rather than through the one of expression implies in general the ability to predict major limitations, including with regard to their social utility.

The above-mentioned article 36 bis par. 1 generally lays down that audiovisual commercial communications shall be readily recognisable as such and it prohibits the ones surreptitious. Then, the following article 37 par. 1 points out that television advertising and teleshopping shall be readily recognisable and distinguishable from editorial content. Without prejudice to the use of new advertising techniques, television advertising and teleshopping shall be kept quite distinct from other parts of the programme by optical, acoustic or spacial means.

Question n. 4.

Please provide a brief summary of any important decisions relating to advertising/ marketing/ sponsoring and human rights adopted by judicial authorities in your country over the last ten years.

Answer n. 4.

Article 1 par. 2 legislative decree n. 145, dated 2 August 2007 states in general that advertising should be clear, truthful and fair. In Italy the most important players in the advertising industry adhere to the Code of Conduct of commercial communication (57th edition of April 6, 2013, the 1st edition of the Code dates back to 12 May 1966). Article 10 of this Code lay downs in particular that "*the commercial communications must not offend moral, civil and religious belief. It must respect the dignity of the person in all its forms and expressions and must avoid all forms of discrimination, including that of gender*". A jury (which has not then the nature of a state court, but that is considered as a form of arbitration between private parties) is required to evaluate the consistency of commercial communications of partners with respect of that Code. The jury has made some important decisions about the relationship between advertising and dignity of the person. For example, recently the jury deemed contrary to the dignity of the person (i) a billboard that showed the body of a naked anorexic model, because it consisted in a commercial exploitation of a dramatic situation (Decision 121/07); (ii) a movie that exploited the issue of dependence on alcohol to advertise a fruit juice (Decision 197/ 04); (iii) the image of naked children running to escape the lashes of a rod (Decision 224/02).

Question n. 5.

Which authority (governmental and/or) monitors the advertising sector? Are specific mechanisms in place to receive complaints from citizens on advertising methods and content?

Answer n. 5.

Since 1992 the Italian Competition Authority (ICA) has been granted the power to repress misleading advertising spread out by any means: TV, newspapers, leaflets, posters, telemarketing, Internet, etc. ICA's competences (that is an administrative self-regulatory body) in the consumer protection field have been provided in article 27 of Consumer Code. Article 27 par. 6 states that when a commercial practice has been or is to be disseminated through periodical or daily press or by radio or television or other means of telecommunication (including Internet), before to provide, ICA seeks the Communications and Regulatory Authority's (AGCOM) non-binding opinion. Consumers who wish to report an unfair business practice or false advertising to ICA can do so via postal mail, fax or on- line by filling in the form available on ICA's institutional website.

With regard to advertising and commercial communication spread by means of audiovisual media services, radio and television programs, law has attributed to AGCOM a regulatory competence for the adoption of detailed regulations of the primary statutory provisions, for the supervision of compliance by the operators in the market and for sanctions of any violations.

Question n. 6.

Has your country adopted legislation on certain advertising or marketing practices such as neuromarketing or behavioural targeting? What challenges have been encountered in doing so?

Answer n. 6.

The articles 36 bis par. 1 lit. b) TUSMAR (Article 36a. par. 1) and 5.3. of legislative decree n. 145, dated 2 august 2007, prohibit each form of commercial communication based on subliminal techniques. Behavioural marketing studies consumers' habits, also connected with their own personal data and their behaviour (deriving from surfing the web, too). The use of private data is, in accordance to "Code for protection of personal data", legislative decree n. 196, dated 30 June 2003, responsibility of the competent National Data Protection Authority.

Question n. 7.

Is the use of private data for commercial purposes regulated in your country? If so, please describe briefly such regulation.

Answer n. 7.

In Italy the use of private data for commercial purposes is regulated in accordance with the provisions of Code for protection of personal data, (legislative decree n. 196, dated 30 June 2003).

Question n. 8

Does your country have regulations on marketing research standards? How is this sector regulated in particular for marketing research involving human beings?

Answer n. 8.

In Italy the use of personal data for marketing research standards is regulated, for example, in accordance with the provisions of article 37 of legislative decree n. 196, dated 30 June 2003.

Question n. 9

Please describe rules regulating outdoor advertising including the use of billboards or screens in your country. Have enforcement mechanisms been established in this respect? Please indicate whether other forms of communication, such as public interest messages and artistic creation, can also be displayed outdoors, including on billboards and screens, and how these are regulated.

Answer n. 9.

Artistic creation, protected by copyright law, can be used in commercial communications only with permission from the copyright owner(s) or his successor in title. According to article 12.2, law n. 633, dated 21 April 1941, on copyright protection, author (and his successor in title) has the exclusive right to publish the work, and to use the work in any shape or form, original or derivative (within limits fixed by the law) and in particular certain exclusive rights such as reproduction and communication to the public, in any manner or form by any process, included public exhibition and displaying. With regard to other aspects, it is the responsibility of another agency.