Episode 9: "Consumer protection and the quality of information in advertising"

[mix of introductory sounds]

Luís Pinto [host]: *Estados do Tempo* (The States of the Times). Because consumer protection and the quality of information in advertising are basic necessities.

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Luís Pinto: Welcome to the ninth episode of *Estados do Tempo*, brought to you by the Barometer for Information Quality and Communitas. Today, we're talking about information asymmetry. This means there are significant differences between what companies or service providers know and what consumers actually learn. To help us explore this topic, we have Ana Amorim with us.

Ana Amorim [guest]: Information asymmetry is one of the main foundations of consumer protection. If we open a consumer law textbook, this is what we find. That is, in the relationship with an economic operator or a company, the consumer typically has less information. But this idea is already a bit outdated because the digital world is changing things. People now talk about a shift in market power. If having information means having power, then today's consumers have a lot of both. As a result, advertising has become more suggestive and emotional, which is where digital influencers come into play.

Luís Pinto: Moderating this conversation is Luís Miguel Loureiro.

Luís Miguel Loureiro [moderator]: This available information is not, at times, also a barrier, given that, potentially, we are all submerged in information? Are we not talking about a new asymmetry?

Ana Amorim: Excess information creates a new asymmetry. That is also studied, in fact. We cannot process so much information, especially in complex sectors that affect, somehow, people's lives for many years.

Luís Pinto: Ana Amorim is an assistant professor at the Faculty of Economics at the University of Coimbra and has a PhD in Legal Sciences from the University of Minho. In 2016, she finished her thesis on "The Protection of Loyalty in Market Relations. On the Issue of Unlawful Advertising," which received a "Very Good" rating. Her main research areas are advertising law and unfair competition. She has written several books and articles, including the "Handbook of Advertising Law" (second edition, 2023), "The protection of loyalty in market relations. On the issue of unlawful advertising," and "Economic parasitism and law." She has also studied topics like advertising, unfair commercial practices, trade secrets, gender equality in advertising, digital influencers, consumer protection, brands, and commercial communication. Between 2023 and 2024, she participated in the project *Consumer Law New Approaches in the Digital Economy*, associated with the Portucalense Legal Institute of the Portucalense University.

Luís Miguel Loureiro is a journalism professor at the University of Minho. He teaches courses in verification and investigative journalism and is part of BIP's coordination team. His career as a journalist, spanning almost 30 years in radio and television, included war reporting in Lebanon and numerous assignments covering conflict.

Luís Miguel Loureiro: And here we are. This is the ninth episode of *Estados do Tempo*, a podcast in collaboration between the Barometer for Information Quality and Communitas, two platforms of CECS, the Communication and Society Research Centre. Today, in this *Estados do Tempo*, we are going to talk about the state of advertising and the way it relates, also, to all of us, as citizens, in the space of citizenship. I have Ana Amorim with me in the studio. She is a professor at the Faculty of Economics of the University of Coimbra. Her academic background is in Law, so she comes from the field of Law, and she completed her PhD in Private Legal Sciences at the Law School of the University of Minho. She has been working specifically on these issues of Law and its relations with private spaces, including, for example, advertising, and the relations between advertising and the citizen, and the protection of the citizen as a consumer, etc. And I would like to first of all thank you very much for being here with us, Ana. I would like to start precisely here. Because one of your areas of interest, which is perhaps already reflected in your works, you have three books published, the latest being a Handbook of Advertising Law, now in its second edition. So, I should say, for a researcher, for a scholar, when we are talking about a field that is usually considered relatively restricted to academic interests, we already have a second edition, so congratulations first of all. So, regarding these information asymmetries, let's break this down and explain what we are talking about. Here at the Barometer for Information Quality, when we look at something like this, we immediately ask ourselves: hang on, what is this about?

Ana Amorim: Good afternoon, thank you very much for the invitation, first of all. So, starting to answer your question. Information asymmetry is one of the main foundations of consumer protection. If we open a consumer law textbook, this is what we find. That is, in the relationship with an economic operator or a company, the consumer typically has less information. But this idea is already a bit outdated because the digital world is changing things. So, this rationale emerged back in the 1960s, 1970s, and 1980s, and it was indeed the case. Advertising was actually a vehicle for disseminating information, almost a necessity, because it was a mass medium that provided potential consumers with a range of product information and had enormous value. This helped consumers make more informed and rational decisions. But all of this today, said in such broad terms, is somewhat outdated, in fact. That is, with the digital environment, we realise that information asymmetry disappears. That is, the consumer has all the information available if they go and look for it. The question is then more sector-specific today. That is, there are still sectors where asymmetry results from the complex or technical nature of goods, and I am thinking, for example, of the financial sector, which I have also worked on, or the health sector.

What happens in the financial sector — and I use the term very broadly here, whether we are talking about an investment product, insurance, or a loan — is that this information asymmetry remains extremely pronounced. And so, advertising, in a way, reclaims that original and fundamental role of conveying information. The same is true in health, where claims about the environment, medicines, and healthcare… information asymmetry is still very much present, as consumers, or potential consumers, still have less information than professionals. So, it's important to restore advertising's role in providing consumers with useful information. In most industries, people now talk about a shift in market power. If information means power, then today's consumers have a lot of both. That's why advertising is now more suggestive and emotional, and this is where digital influencers come in. We can talk more about that soon.

Luís Miguel Loureiro: But this asymmetry can be understood through… perhaps, two angles: the quantity of information and the type of information. That is, information, for example… You mentioned sectors where information is very technical. The language used in those sectors is very technical. So there's coded language there that needs to be decoded, right? And that is where advertising comes in, then.

Ana Amorim: That is where advertising comes in, and then there is also the pre-contractual stage, that is, when an economic operator is dealing with a specific consumer and explains the terms, potentially, of the contract that may be concluded. In advertising, what's needed is transparency and clarity. And, in fact, an acronym or a technical term is not accessible to most average consumers, particularly given that financial literacy is very low — in Portugal, it is among the lowest in Europe. And so, it is necessary to clarify things, yes, at an initial stage in advertising, but above all to reinforce that clarification at the pre-contractual stage, where the economic operator, the financial intermediary, is facing a specific consumer and, depending on their specific needs and any vulnerability they may have, explains the terms of a contract that may later be concluded. So, at that stage as well, it also plays a very important role in those sectors.

Luís Miguel Loureiro: That question of vulnerability, the fragility of consumers, still remains, doesn't it? Even though you said, at the beginning, in your first approach, that people today have much more access to information and therefore can find it more easily through digital platforms, and even… well, perhaps in these kinds of information fields, there is also access to transparency up to a certain level, possibly, but in fact, this available information is not, at times, also a barrier, given that, potentially, we are all submerged in information? Are we not talking about a new asymmetry? I ask you.

Ana Amorim: Too much information creates a new kind of imbalance, and this is something researchers study. We are simply not able to process so much information, especially in those complex sectors, aren't we? Sectors that, in some way, affect people's lives for many years. If I decide to take out a loan, for example, or to buy insurance, or make an investment without properly understanding it, I may end up having my financial life affected for many years. And so, that is more a question of financial literacy, it seems to me, of understanding all that mass of information that comes our way, because it is available and, yes, it is true, vulnerability doesn't go away, and financial literacy also needs to be addressed — but perhaps not through advertising, right? In other public contexts.

Luís Miguel Loureiro: Exactly. In this sense, we can frame the question as follows: what information do we, as citizens, have a right to today? Is it all the information? Because then another question arises: if information is given to us in full… does it become completely transparent? I'm thinking, for example, of a book by Byung-Chul Han — perhaps you've seen it, "The Transparency Society" — in which he raises precisely questions about total transparency, right? I don't want to make this conversation too academic, but you probably know the author; he's fairly widely known, almost as much as Ana's latest book. And in fact, Byung-Chul Han discusses this; he talks about the risks of total transparency, of a transparency in which information providers, so to speak, display all the information they have available. But, in the end, as a form of concealment. I'm circling back, really, to the previous question.

Ana Amorim: If we recognise, as is recognised, for example, in the Constitution, the consumers' right to information, we have to understand that, on the other side, there is the duty of companies to provide that information. And so, law is a scale, right? And all of this has to be balanced, in some way. If I say, on one side of the scale, that the consumer has a right to all available information about a product or service, that becomes unworkable for the economic operator on the other side, who has to provide all that information. And so, the law is constantly seeking to balance these two interests. In most sectors of activity, there are no information duties that apply to advertising. There are later, in the contractual phase, but in this initial phase of advertising, there are practically no legally established information duties. There are in those sectors we mentioned at the beginning, where, in fact, it is justified.

And so, if there are no information duties, it means that the consumer themselves has the burden and responsibility to actively seek out information about the product. They cannot expect, at this stage, that a company will give them all the information about the product they are looking for through information channels. Especially since this is not viable, is it? If we think about digital media, perhaps it is — there you can fit in all the possible information. But in more traditional media, television, radio, with very short spots of 15, 20, 30 seconds… clearly, there cannot be room for all the information about a product or service. And so, the law is already very demanding in certain sectors of activity, but not in all. So this means that the consumer also has to take responsibility — there is no real paternalism here — for seeking information. And the European perspective is also, in this sense, more liberal, in holding the consumer themselves responsible. And not allowing them to play a passive role, is it not? In a way…

Luís Miguel Loureiro: Hence the importance of literacy, right? When we are looking for something or have a problem to solve in life that puts us in a situation of potential information asymmetry, it is useful that we already have critical tools built into us as citizens to address that asymmetry. Acknowledging it, perhaps, right? It will always exist in these cases.

Ana Amorim: Of course. And also thinking about the other side, the companies, the economic operators. Is it reasonable to impose information obligations on them? Beyond a certain limit, across all sectors of activity, across-the-board obligations… is that reasonable? That implies costs; it potentially implies a loss of communication efficiency, because it naturally becomes less effective, and the trend today is towards being more emotional, faster, and more dynamic. So we also have to think about that side, don't we? Communication and freedom of expression apply to companies as well. And we cannot restrict it beyond what is excessive. We come back, in a way, to the idea of balance and equilibrium.

Luís Miguel Loureiro: What you are saying is interesting, but I cannot help, perhaps, but turn it around — and this is my journalist's bias — which is the following: don't you also find situations where you can see devices of concealment, in a way, that is, protection of certain information that is not made available in the most accurate, the most… There you go, even when there is transparency, that transparency then becomes opaque; it contains within itself levels of opacity. What has your research and your interest in this subject told you about this?

Ana Amorim: There is a form of concealment that has worried me, and that has worried all researchers in this area, which is the issue of the advertising nature of communication, which arises in relation to digital influencers, and possibly other more traditional media. And there is concealment there, in fact. But it is something very simple, which is… it is not, perhaps, concealment related to information about the product, because that may be there or may not even be precise. It is the advertising nature of that communication. We are presented with communication that appears to be spontaneous, or at least that we believe to be spontaneous, expressing great satisfaction with a particular product or service, when in fact it stems from a commercial partnership, and that information is missing. And so that concealment is one of the major concerns today in advertising, but it is about the advertising nature itself. It is, of course, mandatory to disclose it, but we know very well that in a very high percentage of social media posts, that information does not appear.

Luís Miguel Loureiro: So, we could say that the problem lies further downstream, doesn't it? That is, perhaps the problem at the origin is not so… for example, we have bad laws, we have laws that need to be improved… You see my question, don't you? In other words, it is at the communication stage itself — we are here in a communicative setting, after all — it is at the communication stage that things are, in some way, being reworked in a direction that is not always for the best. Is that right?

Ana Amorim: Yes. One thing is the law in force, and another is how it is applied, isn't it? If we look only at the law and ask ourselves, is it sufficient for the problems that arise today in advertising? I would say yes, although it is outdated in some respects. Now, the Advertising Code dates back to 1990; it was designed for mass media and completely overlooks the digital sphere, but the truth is that it is also applicable to digital media. For example, I do not think there are major gaps in the law. But application, yes — application is difficult because advertising communication operates in a dynamic: the whole market, companies today operate in a dynamic where what is true today is not true tomorrow. A post that exists today may not be there tomorrow. And so it is very difficult for the law to keep up, to have sanctioning mechanisms, and even to carry out training actions — public institutions could perhaps take on that role — , but it is very difficult today to ensure effective enforcement of the law. Legal gaps? I do not think there is anything particularly significant to point out, in fact.

Luís Miguel Loureiro: Even though the law is over 30 years old?

Ana Amorim: Yes, because there are many more recent laws that complement it, and a 30-year-old law can be very broad in the way it was designed. For example, this issue of identifying advertising — the law states that advertising must be identified, regardless of the means of dissemination. So this clearly applies to digital media; there is no doubt about it.

Luís Miguel Loureiro: Right, but influencers, for example… we are talking here about spaces that are becoming hybrid, where a more vulnerable consumer may not understand, for example… that is the issue with influencers: influencers establish almost individualised relationships with audiences, and therefore these relationships of direct influence over people, which have nothing to do, as you said at the beginning, with mass communication, destabilise the relationships that are regulated, in a way, don't they?

Ana Amorim: Yes, they are regulated, yes, and the Directorate-General for Consumer Affairs also has an information guide on influencer marketing, but the problem lies in enforcement, in fact, and in a certain lack of effectiveness of sanctioning mechanisms in Portugal. In other words, in influencer communication, there is a generalised sense of impunity, and so this form of communication is assumed to be valid, because — whether consciously or not — I know no sanctioning mechanism will be applied, so I continue, don't I? I maintain my partnerships, I live off that…

Luís Miguel Loureiro: So, in that sense, let me ask you a broad question. How do you feel, as a consumer yourself, that consumer protection has evolved? We are in a field that, in principle, should have more advanced critical tools, or is expected to have them. There are areas where literacy is more developed, but not across all fields, isn't there? When we talk, for example, about health literacy, both you and I probably — there may be gaps. I would not say others — economic literacy, or literacy… or other more technical literacies, more basic ones, like, I don't know, engineering-related issues, or a car, for example, right? That sort of thing. But how do you feel consumer protection has evolved? Has there been concern or mechanisms that have improved it? Or are we, in fact, entering territories that in some respects need to be monitored?

Ana Amorim: They do, yes. It's again the issue of impunity, isn't it? What you feel is that there is a great deal of impunity. I often do an exercise: the criterion for assessing advertising is the average consumer. And the standard of "average" is a very abstract one, isn't it? It is not me, it is not Luís, it is not a concrete consumer. It is an entirely abstract average standard. And I try to ask myself: would the average consumer, in this area — be it financial, health-related, or something involving confusion in digital influencer communication — be able to distinguish between one product and another, between spontaneous communication and advertising communication? And I put myself in that position. And I have many doubts. I always have doubts. I still have doubts. And that already says a lot about the position we are all in, doesn't it? I do not know whether I have more or less literacy than the average consumer standard — I am probably somewhere in the middle — and if I have doubts, extending that to society as a whole, as I said earlier, to the ordinary citizen, I assume doubts will also arise there. And so we need to address impunity, possibly by strengthening regulatory bodies that, as we know, have limited resources to filter what is happening in advertising. But it must be done. Someone has to do something.

Luís Miguel Loureiro: When we talk about these issues, I also bring in here your… what resulted in a book, namely the protection of loyalty in market relations, which stems from your doctoral thesis. Tell me about this loyalty protection. It is very interesting for… well, for those who do not have legal literacy, to try to understand loyalty… we can, in a sense, link it to the idea of an ethical relationship between subjects, can't we? Collective or individual, whatever they may be. The protection of loyalty — what does that mean? And applied to our conversation, if you could as well.

Ana Amorim: Yes, in fact, resulting from that…

Luís Miguel Loureiro: I don't want to disconnect this… I don't want to cut this off from what we were talking about before, obviously.

Ana Amorim: Yes, of course. The idea was to conduct a cross-analysis in the doctoral thesis between a discipline of unfair competition, which was very traditional and already over a century old, a more recent legal framework on unfair commercial practices of European influence, and the Advertising Code. And the idea was to cross these three fields and see whether, in fact, this forms a single discipline. And the title comes from that: The Protection of Loyalty in Market

Relations, partly in relation to unlawful advertising. Because loyalty, in that relationship between subjects, emerges mainly at the end of the 19th century and beginning of the 20th century as a relationship between competitors. There was not yet concern for consumers; it was a relationship between companies that needed to be safeguarded to ensure a minimum level of fairness. So acts of denigration were prohibited, comparative advertising raised many doubts, misleading advertising raised many doubts, and confusion between competitors also raised many doubts, because products were similar, and there could be customer diversion. That is where it comes from, and it later evolves into consumer protection.

So today, misleading advertising is a consumer protection issue, and comparative advertising is a consumer protection issue. The legal institutions are the same; they have evolved, of course, as everything does, and the media have evolved too, and the law tries to keep up through the regime of unfair commercial practices, also applicable to influencers, for example, as a transposition of a European directive, and through the Advertising Code. And so the idea was to map that evolution, understand it, and see how these three frameworks intersect and, ultimately, converge today in consumer protection across various dimensions, including privacy protection, for example, in the context of aggressive, door-to-door sales. So there is a convergence of dimensions within this loyalty protection, at least as it is called.

Luís Miguel Loureiro: Because the concept is indeed interesting and not expected — this protection of loyalty, isn't it? It is almost a call for an ethical re-signification of market relations. You mentioned unlawful advertising, which was the subtitle of your work — or still is, since the work has also been published. Unlawful advertising includes the dimensions you mentioned, doesn't it? Misleading advertising, comparative advertising, all of that. We are, in fact — and now coming full circle — also talking about those who exploit loopholes, those who exploit interstices. And today, it is perhaps easy to regulate these situations in traditional advertising spaces, but very difficult to catch them in non-traditional spaces, isn't it?

Ana Amorim: In digital, of course.

Luís Miguel Loureiro: Exactly.

Ana Amorim: Mass media have a filter, after all, don't they? That filter is television, radio, and the press, which disseminate messages under a contract. But they act as a filter, and they are also responsible for whether the message is unlawful. There is also administrative liability for those who disseminate. In digital media, that filter does not exist. And so it is much harder to implement regulation — the implementation has to be public — and impunity arises from that, right? From those gaps that are exploited, because there are no filters.

Luís Miguel Loureiro: Ana, and what about audiences? Because we know that, from a certain age onwards, people… It is not only dependent, but it also does not depend solely on… It does not depend solely on literacy levels or on the literacy levels of each citizen, but also on the type of access, the media, and the means of communication people normally have. So if I am more exposed to traditional media, I am probably less exposed to the issues you describe. But this creates another problem. And what about those who are exposed only to digital media? Who are, moreover, in the process of… Often, younger generations, sometimes without parental control, and so other dimensions emerge. Audiences introduce another layer to the problem, don't they?

Ana Amorim: Yes. Yes. Today, when we talk about vulnerabilities, we often refer to age — children and older people — which is becoming a topic in the European Union.

Luís Miguel Loureiro: I'm glad you brought them in.

Ana Amorim: Because for many years, the focus was on minors and children. Today, it is becoming more complex because older people are a more heterogeneous group. Of course, minors and digital media remain major concerns. There must be parental control, and possibly public regulation of access itself. But in any case, it is not for us to decide that. In this area, the way advertising directed at minors is regulated may already be somewhat outdated. In principle, advertising cannot make a direct appeal to minors, meaning it cannot target them or treat them as a target audience. And yet, of course, it does. And we know it does.

Luís Miguel Loureiro: So there are influencers who work only with…

Ana Amorim: …with minors.

Luís Miguel Loureiro: Exactly.

Ana Amorim: And that is a concern, but one that we do not yet know how to address.

Luís Miguel Loureiro: So we are in a kind of black hole, aren't we?

Ana Amorim: We are.

Luís Miguel Loureiro: A kind of legal black hole. And not only legal, right? But also in terms of a... Of a healthy communicational and informational environment.

Ana Amorim: In terms of enforcement, of course. And today, when we think about advertising directed at minors, we think of toys. But it is not only toys, is it? We know that games have many more concerning issues than a toy. And, in principle, companies that promote toys do so in an absolutely impeccable way. But there is a whole new world that digital is bringing about. Namely, illegal games and betting, involving the use of payment methods. And so, yes, that is concerning.

Luís Miguel Loureiro: Ana Amorim, thank you very much for coming to *Estados do Tempo*. It was a brief, very pleasant conversation, and I hope it was informative for those who follow our podcast.

Ana Amorim: Thank you for the invitation.

Luís Miguel Loureiro: So we'll leave it here. Episode 9 of *Estados do Tempo*. I would like to remind listeners that on the website b-info.pt you can find all the information about the Barometer for Information Quality's activities, which organised this ninth episode of the *Estados do Tempo* podcast. Next month, it will be our colleagues from Communitas's turn, the other platform that co-runs *Estados do Tempo* with us. Thank you very much.

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Luís Pinto: This marks the end of the ninth edition of *Estados do Tempo*. The discussion was moderated by Luís Miguel Loureiro. The guest was Ana Amorim. Tiago Estevão was responsible for curating this episode. Post-production and sound design were, once again, by Pedro Gaspar. And the introduction by Luís Pinto. Thank you for being with us once again, and see you in our next episode of *Estados do Tempo*.

[closing music]