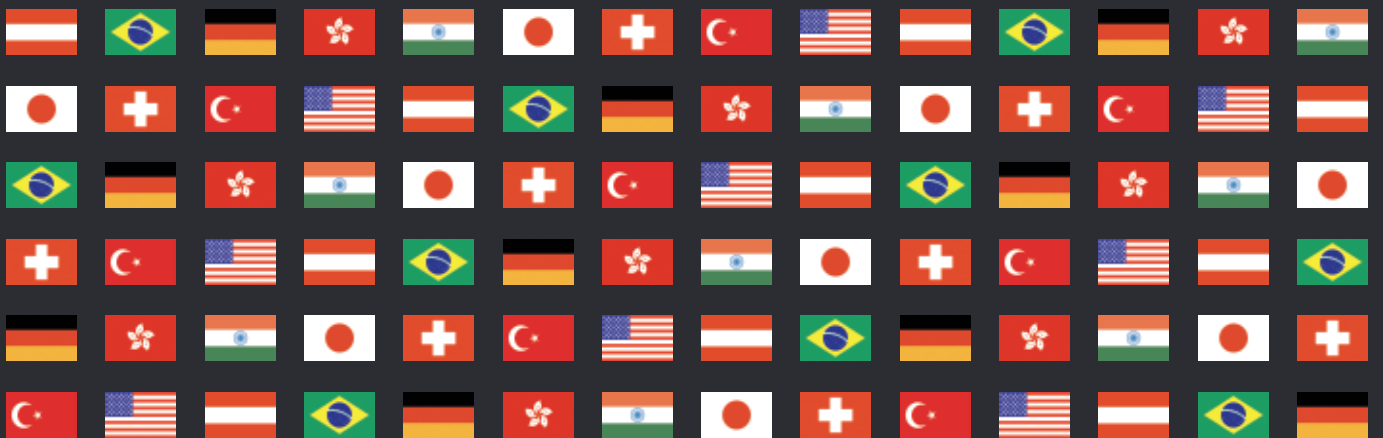


# Advertising & Marketing 2021

Contributing firm  
Frankfurt Kurnit Klein & Selz, PC



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Lexology Getting The Deal Through is delighted to publish the eighth edition of *Advertising & Marketing*, which is available in print and online at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Germany and Turkey.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to Frankfurt Kurnit Klein & Selz, PC, for its continued assistance with this volume.



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# France

Michel Bejot and Caroline Bouvier

Bernard-Hertz-Béjot

## LEGISLATION AND REGULATION

### Legal framework

1 | What are the principal statutes regulating advertising generally?

Advertising is regulated by laws and their implementing texts, such as decrees and ordinances. For instance, Law No. 94-665 of 4 August 1994 (the Toubon Law) imposes and governs the use of the French language in all advertising. Decree No. 92-280 of 27 March 1992 provides for specific rules dedicated to advertising on television. There is no code governing advertising law, but rather various codes per sector including rules governing advertising in France.

For example, the Consumer Code covers deceptive and misleading advertising, as well as comparative advertising; the Intellectual Property Code deals with the protection of trademarks and copyright; and article 9 of the Civil Code protects individuals' images and privacy.

### Regulators

2 | Which bodies are primarily responsible for issuing advertising regulations and enforcing rules on advertising? How is the issue of concurrent jurisdiction among regulators with responsibility for advertising handled?

The French advertising self-regulation agency (ARPP) represents advertisers, agencies and the media. It details expected ethical standards (self-regulatory rules entitled recommendations) and secures proper implementation of these standards through advice and pre-clearance, including providing mandatory advice before the broadcast of all television advertising.

The French data protection agency (CNIL) also ensures the protection of personal data when it is violated, for instance, in connection with unsolicited direct canvassing by email, illicit data collection or processing of personal data.

The French consumer and competition governmental authority (DGCCRF) has broad investigative powers in relation to all matters pertaining to the protection of consumers, including advertising practices.

DGCCRF agents are entitled to enter the professional premises of the advertiser, advertising agency or communication agency during business hours, to request an immediate review of documents, take copies of them and ask questions.

Depending on the violation, a claim can be brought before civil or criminal courts.

### Regulators' powers

3 | What powers do the regulators have?

The French advertising self-regulation agency (ARPP) works with an independent jury (JDP), which handles complaints against advertisements that violate ARPP recommendations. Its decisions are published on its website (this is seen as a sanction in itself).

The French data protection agency (CNIL) is also empowered to pronounce sanctions against a data controller (eg, an advertiser) when it violates the data protection law (up to €20 million or 4 per cent of their global turnover). Law No. 2016-1321 (the Digital Republic Law) of 7 October 2016 anticipates the main rules set by the EU General Data Protection Regulation ((EU) 2016/679) (GDPR), which entered into force on 25 May 2018. Before issuing a sanction, the CNIL is also empowered to carry out an on-site investigation.

### Regulators' priorities

4 | What are the current major concerns of regulators?

The French advertising self-regulation agency's concerns are focused on transparency, in particular, where adverts are broadcast on digital media or when they are made indirectly by influencers on social media.

The Recommendation (and Guidelines) issued by CNIL on 17 September 2020 and published on 1 October 2020, must be complied with, in particular concerning the duration of the storage of the consent, or the refusal, of the user to have tracking technologies such as cookies stored in his or her device.

Indeed, a website's editor must inform its users of the purposes of the use of tracking technologies and the users must be able to reject tracking technologies as easily as it is proposed to them to accept them (the use of an 'accept all' button and of a 'refuse all' button is possible).

There are exemptions of consent in certain instances (eg, language preference).

If the user does not make any choice and continues browsing, the website's editor will have to consider that the user rejected the use of tracking technologies (except for those that benefit from the 'consent' exemption).

A six-month storage of the user's choice is recommended. Once this six-month period elapses, the user must be asked again whether he or she accepts the storage of 'non-essential' cookies (whether he or she accepts the use of tracking technologies).

### Industry codes

5 | Give brief details of any issued industry codes of practice. What are the consequences for non-compliance?

The French advertising self-regulation agency (ARPP) recommendations are based on best-practice standards among professionals

(advertisers, advertising agencies and media) and on the rules set by the International Chamber of Commerce.

The ARPP acts in cooperation with the independent jury (JDP), which is in charge of dealing with complaints against advertisements that do not comply with the recommendations. These complaints can be brought either by competing advertisers, public associations, governmental authorities or private individuals. In order to be brought before the JDP, a claim must meet the following criteria:

- it must be brought against an advertisement;
- the advertisement in question must be identifiable and have been broadcast in France; and
- it must be based on a violation of the self-regulatory rules.

The JDP is not permitted to sanction the violation of French advertising law, nor is it empowered to issue civil penalties. However, its decisions are published on its website (which is a sanction in itself from the advertisers' point of view).

An appeal can be brought against the JDP's decision within 15 days of the date the decision is received by the parties. The appeal is brought before the Reviewer of Advertising Ethics, who is an individual appointed by the ARPP for a three-year term (he or she is not a member of the JDP).

There is also an urgent proceeding that can be handled by the ARPP, in the event of a serious violation of the ARPP's recommendations: the ARPP's president or general manager is entitled to carry out all necessary measures, in particular, through the sending of a cease-and-desist letter requesting the discontinuation of the advert to the professional concerned (advertiser, advertising agency or media). The ARPP's president, or the general manager, informs the JDP accordingly. In the event that a claim is filed before the JDP, the JDP issues its decision within a time frame that is shorter than the standard procedure. Further, the time limit for bringing an appeal against the JDP's decision is two days from the receipt of the decision.

### Authorisation

#### 6 | Must advertisers register or obtain a licence?

No.

### Clearance

#### 7 | May advertisers seek advisory opinions from the regulator? Must certain advertising receive clearance before publication or broadcast?

Advertising for medicines (targeting health professionals or consumers) requires that an approval be delivered by the French health agency before the advert is published or broadcast.

The ARPP provides advice before broadcasting for all adverts, irrespective of the media (not compulsory). A pre-clearance request must be filed with the ARPP for the television broadcast of adverts. French television channels refuse to broadcast any advert that has not been previously approved by the ARPP.

## PRIVATE ENFORCEMENT (LITIGATION AND ADMINISTRATIVE PROCEDURES)

### Challenging competitors advertising

#### 8 | What avenues are available for competitors to challenge advertising? What are the advantages and disadvantages of the different avenues for challenging competitors' advertising?

Competitors are entitled to file a claim before the independent jury (JDP). The advantage is that the decision is issued rapidly (within three months), as opposed to a decision handed down by French courts. However, the JDP's scope of action is limited to violation of the French advertising self-regulation agency (ARPP) recommendations. In addition, the JDP is not entitled to impose any sanction such as monetary damages.

A competitor can also bring a lawsuit before French courts (civil or criminal courts, depending on the ground of action). The decision will be rendered within a longer time frame than in the self-regulatory system. The competitors will be able to request that the judge allocates monetary damages or orders the discontinuation of the advert and the publication of the court decision, for instance, in newspapers or on a website. The competitor will, nonetheless, have to bear the costs associated with the litigation, in particular, the payment of a lawyer's fees and expenses (filing a claim before the JDP can be free of charge as the appointment of a lawyer is not compulsory).

### Public challenges

#### 9 | How may members of the public or consumer associations challenge advertising? Who has standing to bring a civil action or start a regulatory proceeding? On what grounds?

Any individual can bring a lawsuit to challenge an advert, provided that he or she is able to show that he or she has an interest in bringing a lawsuit (ie, that he or she suffered a prejudice (eg, a misleading ad)). French associations are also entitled to bring a lawsuit in the event that the interests that they represent have been violated (eg, the association that fights alcoholism).

Competitors, as well as members of the public or consumer associations, are entitled to file a claim before the JDP.

### Burden of proof

#### 10 | Which party bears the burden of proof?

As a general rule under the French Civil Procedural Code, the plaintiff must prove his or her prejudice.

The French Consumer Code allows, in certain instances, more flexibility regarding the burden of proof, because certain acts are deemed unfair or misleading per se (and thus prohibited); for instance, when an advertiser pays for content in the media to promote its product or service without clearly stating it in this content or through images or sounds clearly identifiable by the consumer (article L121-4-11° of the Consumer Code).

### Remedies

#### 11 | What remedies may the courts or other adjudicators grant?

The following remedies can be granted:

- monetary damages;
- the discontinuation of the advert;
- the publication of the decision; and

- the payment of the court and procedural costs (as set by the judge). These amounts never cover the entire costs and expenses incurred in the litigation (in particular, the lawyer's fees).

### Length of proceedings

- 12 | How long do proceedings normally take from start to conclusion?

Proceedings take approximately one to one-and-a-half years, for a civil action brought before the first-degree tribunal. A similar time period would apply in the event an appeal is brought before the Court of Appeal.

### Cost of proceedings

- 13 | How much do such proceedings typically cost? Are costs and legal fees recoverable?

The time to be spent by the lawyer (and thus the corresponding fees) to handle a case until a decision is rendered by a judge is difficult to assess and depends on the nature and complexity of the matter.

The judge can allocate a certain amount to the winning party, destined to compensate the fees and expenses incurred in handling the litigation, but these amounts never cover the entire costs and expenses incurred (in particular, the lawyer's fees).

### Appeals

- 14 | What appeals are available from the decision of a court or other adjudicating body?

The time limit for bringing an appeal against a court's decision is, for civil matters, one month from the date the decision is served upon a party. When the notified party is located abroad, this one-month period is extended to three months.

The time limit for bringing an appeal against the independent jury's decision is 15 days from the date on which the decision is sent to the party, except in an urgent proceeding, for which the time limit is reduced to two days.

## MISLEADING ADVERTISING

### Editorial and advertising

- 15 | How is editorial content differentiated from advertising?

Law No. 2004-575 (the Digital Economy Law) of 21 June 2004, which addresses some specificities of activities carried out through the internet (liability of the service providers, the conclusion of online agreements, etc), provides general rules that are the same as those applied in the 'real world', such as the requirement to have the adverts, whatever the form (pop-ups, advert banners, etc), identified as such and therefore clearly distinguished from the non-commercial information (article 20).

The French Consumer Code also requires transparency: when an advertiser pays for content in the media to promote its product or service without clearly stating it in this content or through images or sounds clearly identifiable by the consumer, he or she can be deemed liable for the misleading advert or act of unfair competition (article L121-4-11° of the Consumer Code).

The French advertising self-regulation agency (ARPP) has issued a recommendation dedicated to digital adverts. This recommendation, updated in June 2017, also contains annexes providing for more specific guidelines per type of advertising and marketing activities, such as the communication carried out by influencers, native advertising, etc.

As a general rule, marketing communications and advertising should be clearly distinguishable as such, whatever their form. Identification of such can be achieved by any means whereby the

consumer can clearly and immediately understand that the message is an advert.

### Advertising that requires substantiation

- 16 | How does your law distinguish between 'puffery' and advertising claims that require support?

Hyperbolic advertising is possible under French law. The judge assesses what the average consumer is able to understand and ensures that the same cannot be misled by the content of the advert. It is thus a matter of facts and interpretation.

Otherwise, the advertiser must be able to substantiate the claims related to the product or service.

### Rules on misleading advertising

- 17 | What are the general rules regarding misleading advertising? Must all material information be disclosed? Are disclaimers and footnotes permissible?

Misleading advertisements are subject to sanctions. The sanction forms part of the broader infringement called misleading commercial practices, which is divided into two categories:

- misleading commercial practice resulting from a positive action: advertising must not create confusion with any product, trademark or trade name and must not include false information; and
- misleading commercial practice resulting from an omission (eg, not providing information that is essential for the recipient of the advertisement (in particular, the main characteristics of the product)).

The main sanctions are, for individuals, a two-year prison sentence and a fine of up to €300,000. This fine can also be set to an amount equivalent to 10 per cent of the average turnover of the advertiser over the previous three fiscal years (known at the date of the infringement) or 50 per cent of the expenses incurred in creating the advert or in carrying out the commercial practice. For legal entities, the fine is of up to €1,500,000. This fine can also be set to an amount equivalent to 10 per cent of the average turnover of the advertiser over the previous three fiscal years (known at the date of the infringement) or 50 per cent of the expenses incurred in creating the advert or in carrying out the commercial practice. Additional sanctions may be ordered (eg, the publication of the decision).

Substantiation is required. The rules on misleading commercial practices apply to all advertising claims that cannot be substantiated by the advertiser. To that effect, footnotes are permissible but not imposed.

### Substantiating advertising claims

- 18 | Must an advertiser have proof of the claims it makes in advertising before publishing? Are there recognised standards for the type of proof necessary to substantiate claims?

Under the general principle according to which the provision, in adverts, of false information is prohibited, advertisers must be able to substantiate any claim made in their advert. As a result, an advertiser must have proof of the claims before publishing or broadcasting the advertisement.

There is, however, no specific recognised standard that would provide guidelines on the way to substantiate the claims and that would list the necessary documentation to be gathered to that effect.

## Survey results

### 19 | Are there specific requirements for advertising claims based on the results of surveys?

There is no specific requirement: general rules apply.

## Comparisons with competitors

### 20 | What are the rules for comparisons with competitors? Is it permissible to identify a competitor by name?

Comparative advertising is permitted in France, provided that the following rules are complied with:

- the comparison must concern goods or services that cover the same need, or that have the same purpose;
- the comparison must be objective and exclude any reference to subjective criteria such as taste, smell or visual appearance;
- the comparative advertisement must objectively compare one or several essential, accurate, verifiable and main defining characteristics of the goods or the services (eg, the price);
- the comparative advertisement must not mislead, or attempt to mislead, the public;
- the comparative advertisement must not, without valid cause, take advantage of any goodwill in the trademark or name of the competitor;
- the comparative advertisement must not disparage the trademark, trade name or other distinctive brand of the competitor; and
- the comparative advertisement must not lead to confusion between the advertiser and their competitor.

Provided that those rules are complied with, it is possible to refer to the name of a competitor in an advert.

## Test and study results

### 21 | Do claims suggesting tests and studies prove a product's superiority require higher or special degrees or types of proof?

There is no higher or special degree of type of proof per se but, from a practical standpoint, it will be easier to demonstrate that the advertiser has provided misleading content if he or she is not able to substantiate the claim and figures that have been advertised.

## Demonstrating performance

### 22 | Are there special rules for advertising depicting or demonstrating product performance?

There is no specific requirement: general rules apply.

## Third-party endorsements

### 23 | Are there special rules for endorsements or testimonials by third parties, including statements of opinions, belief or experience?

The ARPP issued a recommendation addressing the use of testimonials in adverts. An advertising claim, no matter the form, that uses testimonies or certifications of persons, whether or not they are famous, must comply with the following rules: marketing communications should not contain, nor refer to, any testimonial, endorsement or supportive documentation unless it is genuine, verifiable and relevant.

Moreover, when advertising, no matter the form, uses certifications and testimonies from well-known persons whose expertise is not questionable and allows them to give authorised advice on the subject, the certifications must comply with these requirements:

- they must be based on product experiences that the person had him or herself (or under his or her supervision) in regular-use conditions; and
- the conditions in which the experience was gained and in which the results were found must be clearly indicated in a document drafted before the first publication of the advertisement.

Finally, the ARPP issued a Recommendation, updated on 1 July 2019, dedicated to cosmetic products. This Recommendation states, in particular, that when tests are mentioned in an advert, their nature must be clearly specified; that is, whether they are objective or clinical tests or consumer satisfaction tests. In addition, it is allowed to rely on a recommendation, made by one or several members of a medical, paramedical or scientific profession, pertaining to an ingredient of a product, a product or a general message on hygiene or beauty, provided that this recommendation is based on objective scientific ascertainable proofs, and that it does not reflect the personal opinion of one or a few of these individuals. When the recommendation for a product is made by someone working for the brand at stake, such a connection must be clearly stated in the ad.

## Guarantees

### 24 | Are there special rules for advertising guarantees?

According to the Consumer Code, advertising must not contain false information concerning the extent of the professional's commitment, in particular, the replacement or repair of the product and the right of the consumer thereof.

In addition, the Consumer Code also considers as misleading the practice that creates the false impression that after-sales service in relation to a product is available in a member state other than the one in which the product is sold.

Finally, the seller's conditions of sale must quote the rules applicable to the legal warranty when the product is sold to a consumer.

## Environmental impact

### 25 | Are there special rules for claims about a product's impact on the environment?

The general rule of the prohibition of misleading advertising applies. For instance, an advert stating that a trader (including his or her commercial practices) or a product has been approved, endorsed or authorised by a public or private body when it has not, or making such a claim without complying with the terms of the approval, endorsement or authorisation is deemed misleading.

Moreover, the French advertising self-regulation agency Recommendation pertaining to sustainable development provides for specific rules on this issue. For instance, the words or expression should not mislead the public as to the nature and the extent of the properties of the product or the actions of the advertiser in terms of sustainable development.

Where it is impossible to justify general statements (such as ecological, green, ethical, responsible, preserve, equitable, durable, etc) the advertising should nuance them by using wording such as 'contribute to'. For instance, a claim such as 'this product helps to protect the environment' should be preferred to a more general one such as 'this product aims at protecting the environment'.

In addition, advertising should not, directly or indirectly, incite excessive consumption or the wasting of energy or natural resources.

Moreover, the representation of motor vehicles outside public and private roads, in an off-road situation, is prohibited.

The French advertising self-regulation agency updated this Recommendation (the update is in force since August 2020). The main

change is the scope of this Recommendation, which has been extended to all ads, irrespective of whether they contain a direct or indirect sustainable development claim.

Thus, the general rules set forth in this Recommendation will have to be complied with by any advertiser. The French advertising self-regulation agency refers to the wording 'compliance by design' to describe this important change.

### Free and special price claims

#### 26 | Are there special rules for describing something as free or a free trial or for special price or savings claims?

The offer of free products is not prohibited per se under French law. The offer of certain types of products for free (and therefore the corresponding advertisement) is, however, prohibited, such as offers for alcoholic beverages or drugs.

Sales with premiums are also legal per se under French law, except if a premium sale is deemed an unfair commercial practice under Directive 2005/29/EC, which deals with unfair commercial practices in the internal market. A commercial practice is 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.

Concerning the specific issue of 'special price', the following rules applicable to sales and price reductions will apply.

Article L310-31 of the French Commercial Code defines the sales operation (*soldes*), the authorised periods and the goods concerned. The sales accompanied or preceded by advertising and presented as tending, by a price reduction, to the accelerated flow of the inventories, are deemed '*soldes*'. Article 16 of Law No. 2019-486 of 22 May 2019, relating to the growth and transformation of companies, modified the determination of the *soldes* periods: they are now determined by order of the Minister of the Economy, for a period ranging from three to six weeks. The Decree of 27 May 2019 sets the duration of each *soldes* period at four weeks, as well as the dates and times when *soldes* start:

- 8am on the second Wednesday in January (or the first Wednesday in January if the second Wednesday is after 12 January); and
- 8am on the last Wednesday in June (or the second from last if the last Wednesday is after 28 June).

The dates of the *soldes* for online sales are the same as those applying to national sales for traditional stores, irrespective of where the company is located.

Any announcement of price reduction is legal provided that it is not an unfair commercial practice and complies with the Act dated 11 March 2015. Since that date, the calculation of the reference price no longer refers to any criteria, so that those used before the enactment of this Act (eg, the lowest price within the past 30 days, the recommended price, etc) are no longer compulsory. Thus, the calculation of the reference price turns on the free interpretation or assessment of the seller, provided that the price reduction does not constitute an unfair commercial practice as prohibited by Directive 2005/29 and implemented in the French Consumer Code under section L121-2. As a consequence, the sellers must be able to provide evidence of the reference price chosen to advertise price reductions (bills, recommendation from the manufacturer, or any other document used to assess the reference price).

Article 2 of the EU Directive 2019/2161 of 27 November 2019 adds an article 6a to the Directive 98/6/EC, which aims at strengthening the rights of consumers, and provides that:

1. Any announcement of a price reduction shall indicate the prior price applied by the trader for a determined period of time prior to the application of the price reduction.

2. The prior price means the lowest price applied by the trader during a period of time not shorter than 30 days prior to the application of the price reduction [...]

Member states shall adopt and publish the measures necessary to comply with this Directive by 28 November 2021 and they shall apply those measures from 28 May 2022.

Thus, the EU Directive 2019/2161 aims at reintroducing into national law of member states the concept of reference price as it was used before the aforementioned 2015 Act.

Moreover, an order dated 12 December 2018 provides that, for a period of two years from 1 January 2019 (the experimental period), the accumulated promotional advantages concerning food products and pet food offered to a consumer for a specific product must not exceed 34 per cent of the sale price, or an increase of the equivalent quantity sold. These advantages offered by the reseller or the provider must concern products that do not represent more than 25 per cent of:

- the turnover set in the agreement concluded between the provider and the reseller;
- the amount of sales set in an agreement addressing the production of food products; and
- the anticipated amount pertaining to the agricultural perishable product or coming from short production cycles.

From a practical standpoint, this means that, for food products and pet food offered to a consumer, it is no longer possible, during this experimental period of two years, to offer one product for free upon the purchase of one product. However, the promotion offering one product for free upon the purchase of two products is still possible.

This experimental period has been extended until 15 April 2023 by the law dated 7 December 2020. But the field of the food products subject to the aforementioned promotion framework has been amended: foodstuffs whose sale has a marked seasonal character are excluded from the promotion framework. The seasonal character of the sales has been defined as follows: 'more than half of the sales are made during a period of a maximum of 12 weeks'. The list of products concerned will be defined by decree.

Finally, general rules prohibiting misleading adverts apply. A commercial practice that consists of describing a product as gratis, free, without charge or at a special price or similar, if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item, is deemed misleading.

### New and improved

#### 27 | Are there special rules for claiming a product is new or improved?

The words 'new' or 'improved' must be used carefully, in order to avoid that the advert be deemed misleading.

According to ARPP's recommendation entitled 'Vocabulary in Advertising', the word 'new' (and similar wordings) can only be used when a real modification has been made (in particular, a modification of the product (eg, formulation or recipe), its instruction manual, its presentation or packaging). The use of the word 'new' should also be limited to a period of one year, according to these recommendations.



## Claims of origin

### 28 | Are there special rules for claiming where a product is made (such as country of origin)?

The 'CE' marking was introduced pursuant to European technical harmonisation legislation.

It is mandatory for all products covered by one or more European directives that expressly provide for it and such marking guarantees free movement throughout the EU for these products. To be entitled to affix the CE marking to their products, manufacturers must conduct, or have conducted, controls and tests ensuring that the products comply with essential requirements, particularly those concerning health and safety, as set forth in the relevant directives.

CE marking is not a certification and it does not attest to the product's geographical origin.

Being both mandatory and regulatory, it represents a manufacturer's visible confirmation that its product complies with European legislation.

Whether a product manufactured in France or imported is subject to a CE marking obligation can be verified in the technical harmonisation directives or by referring to national measures transposing them.

These directives specify the scope of application for the relevant products and, where applicable, the excluded products. There are currently around 20 technical harmonisation directives providing for the affixing of CE marking relating to a huge range of products. Only the products mentioned in these directives are obliged to have the CE marking.

The 'made in France' label is compulsory for food products when the absence of this information can lead the consumer into confusion (for instance, a product called 'Provençal spices' with a French flag featured on the packaging but that does not come from France will have to bear its geographical origin) or for pre-packed meat (with the information pertaining to the breeding place and the point of slaughter).

Otherwise, the 'made in France' label is not compulsory. However, when the 'made in France' label is featured on the packaging of the product, the general rule of truthful and honest commercial claim applies, otherwise it will be deemed to be misleading advertising.

## PROHIBITED AND CONTROLLED ADVERTISING

### Prohibited products and services

#### 29 | What products and services may not be advertised?

The following may not be advertised:

- firearms, weapons and ammunition: the content of advertising for firearms is regulated. Only the name of the manufacturer or distributor, the technical specifications, the price and the sales conditions may be advertised and only in specific media; and
- tobacco products (cigarettes, cigars, snuff and pipe tobacco): any propaganda or advertising, direct or indirect, in favour of tobacco, tobacco products or ingredients is prohibited. Any form of commercial communication or advertising (ie, any act, whatever the purpose or the media, the effect of which is to remind the public of tobacco products or brands) is prohibited. This prohibition also applies to electronic cigarettes. The prohibition of indirect advertising is defined in the broadest way possible. Limited exceptions apply to tobacco advertising at certain motor sports events.

### Prohibited advertising methods

#### 30 | Are certain advertising methods prohibited?

Subliminal advertising is prohibited in France, on television in particular (article 10 of Decree No. 92-280).

Spamming is also regulated; the general principle is to obtain the prior consent of the recipient (opt-in) of commercial communication by email, SMS or facsimile (article L34-5 of the Postal and Electronic Communications Code).

### Protection of minors

#### 31 | What are the rules for advertising as regards minors and their protection?

Advertising dedicated to minors is strictly regulated in France, in particular by Decree No. 92-280 as regards advertising on television (article 7). Adverts must preserve their moral and physical integrity. Adverts must not invite children to convince their parents to purchase a product. Children must not be presented in a dangerous or harmful situation.

The French advertising self-regulation agency (ARPP) also issued a recommendation addressing advertising to children. For instance, the advertising must not be likely to offend sensibilities, shock or cause provocation by disseminating images of children that violate their dignity or decency. The advertising must avoid scenes of moral or physical violence or abuse, whether direct or implied. Under no circumstances may the advertising, through its messages or its presentation, play down the significance of violence or abuse, or give the impression that such behaviour is acceptable.

### Credit and financial products

#### 32 | Are there special rules for advertising credit or financial products?

Article L533-12 of the Monetary and Financial Code sets the strict criteria for adverts for consumer credit. For instance, the content must be accurate and not misleading. Aggressive practices are prohibited.

In 2014, the French authority governing the financial market issued guidelines (Recommendation No. 2014-05 of 8 July 2014) to ensure the clear advertising of financial products.

In particular, the adverts must comply with the following rules:

- adverts must contain the following information: information showing that the message is an advert, the identity of the advertiser, the nature of the product or the service promoted in the advert and the interest rate;
- adverts must state whether there is a promotional offer;
- the content of the message must be clear, audible and understandable;
- the advertiser must have a responsible behaviour and protect minors; and
- the risk and the results met in the past must be presented.

The ARPP also issued three recommendations addressing the following products and services:

- atypical investment and related services;
- financial products and agreements with leverage effect (trading on the Forex), stock index, raw material and binary options; and
- financial and investment products and services.

### Therapeutic goods and services

#### 33 | Are there special rules for claims made about therapeutic goods and services?

Advertising for medicinal products is permitted only for products that are not reliant on medical prescription and are not refundable by the compulsory health insurance (article L5122-6 of the Public Health Code).

Article L5122-2 of the Public Health Code provides that adverts for medicine must not be misleading or violate public health. The advert must objectively present the product and facilitate its proper use.

The advert must comply with the specific rules pertaining to the entry of the product on the market, as well as with the therapeutic strategy, as set by the Health Authority.

## Food and health

### 34 | Are there special rules for claims about foodstuffs regarding health and nutrition, and weight control?

The Public Health Code provides that health messages should be added to advertising for manufactured food products and drinks on television, cinema, radio, in print media and on posters and marketing flyers for supermarket distribution.

The health message is not compulsory. If advertisers choose not to comply with this message requirement, they must pay 5 per cent of the cost of the promotional campaign to the national nutritional policy.

The following messages must be used:

- 'for your health, eat at least five portions of fruit and vegetables per day';
- 'for your health, practice sport regularly';
- 'for your health, do not eat rich foods high in sugar or salt'; and
- 'for your health, limit eating outside of meal times'.

Further, since 1 October 2017, the wording 'retouched photograph' has to be presented with commercial photographs of models whose body appearance has been refined or enhanced; this requirement is aimed at fighting anorexia and bulimia.

Moreover, in the ARPP recommendation on cosmetic products (amended version in force on 1 August 2020), there is a specific rule on slimming according to which weight loss is the result of either illness or a specialist treatment or a change of diet. Therefore, in a claim concerning cosmetics, no reference can ever be made to the word slimming or to any derived terms.

## Alcohol

### 35 | What are the rules for advertising alcoholic beverages?

A drink is considered an alcoholic beverage if it has an alcoholic strength by volume of more than 1.2 per cent.

Direct or indirect propaganda or advertising in favour of alcoholic drinks is only allowed in limited cases as provided by the Public Health Code, which specifies (articles L3323-2 et seq):

- a limited list of permissible media (eg, in press for adults, certain categories of radio stations at specific times or on noticeboards or signs), which does not include television; and
- a limited list of information (eg, the degree of alcohol, the origin and components of the product, the name and the address of the manufacturer, the modalities of the sale and consumption of the product).

Propaganda or advertising in favour of an organisation (firm, association or foundation), a service, an activity or a product other than an alcoholic drink that, by its graphics, presentation or any distinctive sign, reminds consumers of an alcoholic drink, is deemed 'indirect propaganda or advertising'.

Finally, any sponsorship campaign that has, as its purpose or effect, the direct or indirect propaganda or advertising in favour of alcoholic drinks is forbidden.

Several amendments to the alcohol policy law, the Evin Law, have been carried out, notably to:

- extend the scope of authorised content (2005 amendment: reference to the geographic origin of a product has been added to the list of information that is allowed in alcohol adverts);
- take into account the existence of new media (2009 amendment: online communication services have been added as an authorised medium, under the following conditions: online alcohol adverts should not be intrusive (such as pop-ups) or interstitial and remain, in any case, prohibited on websites that are, by their character, presentation or purpose, mainly destined to young people); and
- promote French local production (2016 amendment: the content, images, presentations, descriptions, comments or references concerning a production region, toponymy, a geographical reference, local production, an itinerary, a production area, local knowledge, history, culture, food or landscape heritage, related to an alcoholic beverage, is not deemed an advert for an alcoholic beverage, and thus not prohibited).

## Tobacco

### 36 | What are the rules for advertising tobacco products?

Any propaganda or advertising, direct or indirect, in favour of tobacco, tobacco products or ingredients is prohibited; there is an exception for tobacco retailers. There is also an exception for the television broadcasting of motor sports events filmed in a country where advertising of tobacco products is permitted (article L3512-4 of the Public Health Code).

A health message must be featured on all tobacco product packets (article L3512-22 of the Public Health Code).

Packets containing cigarettes, tobacco and cigarette papers must be neutral and standardised (article L3512-20 of the Public Health Code).

## Gambling

### 37 | Are there special rules for advertising gambling?

Law No. 2010-476 of 12 May 2010 implemented a controlled opening up of the state monopoly on gambling and sports betting on the internet. The scope of the controlled opening is limited to the random games that require participants' knowledge and that are less likely to induce addiction than games such as slot machines or other lotteries that offer a higher frequency of draws. Therefore, the games coming under this law are horse race betting, sports betting and poker games.

This Law also sets the rule applicable to advertising for betting and gambling activities and services (article 7).

Any commercial communication promoting a betting or gambling service must comply with the following rules:

- it must contain a health message preventing excessive gaming and referring to the informative and help assistance system, as implemented by the aforementioned law; and
- advertising of such is prohibited in publications, audiovisual communications and online communication services targeting minors, as well as in cinemas broadcasting films accessible to minors.

## Lotteries

### 38 | What are the rules for advertising lotteries?

Commercial operations based on chance are governed by different rules depending on whether they are offered to consumers or professionals.

When they are offered to consumers, they are licit per se (under articles L121-1 et seq of the Consumer Code: promotional lotteries), provided that they do not constitute unfair commercial practice. There is no specific rule addressing the advertising aspect of a game of chance.

When they are offered to professionals, they are regulated by articles L322-1 et seq of the French Interior Security Code, which prohibits commercial operations meeting the four following criteria (lotteries):

- a public offer;
- the hope of a gain;
- the element of chance (draw); and
- a payment or a financial sacrifice.

And, according to article L322-2-1 of the Interior Security Code, a financial sacrifice exists even when a reimbursement of a payment is offered to the participant.

Games of chance aimed at professionals are thus more strictly regulated in France than games of chance or commercial lotteries aimed at consumers.

### Promotional contests

#### 39 | What are the requirements for advertising and offering promotional contests?

There is no specific rule addressing the advertising aspect of promotional contests.

### Indirect marketing

#### 40 | Are there any restrictions on indirect marketing, such as commercial sponsorship of programmes and product placement?

Under article 14-1 of Law No. 86-1067 of 30 September 1986, the Audiovisual High Council (CSA) is empowered to set the rules applicable to product placement.

In a Deliberation dated 16 February 2010, as amended on 24 July 2012, the CSA decided that product placement is only authorised for cinematographic works, audiovisual movies, fictional programmes and video clips. Otherwise, product placement is prohibited (eg, in television news). The following products cannot benefit from product placement: alcoholic beverages, tobacco products, medicines, weapons and infant formula.

Programmes that contain product placements must comply with the following rules (article 18 of Decree No. 92-280):

- the content and the date of broadcasting must not be influenced in such a way that the liability and editorial freedom of the editor are altered;
- they must not directly incite viewers to purchase or lease the products or services advertised and must not contain specific references to these products, services or trademarks; and
- the sponsorship must be identified as such at the beginning of, the end of, or during the programme.

This identification can be achieved through the use of a logo or any other sign of the sponsor, in particular, with reference to the products or service, or through any other distinctive sign, provided that the reference to the sponsor is occasional and discreet (it must not be a slogan nor consist of the presentation of the product itself or its packaging).

In addition, when a sponsor finances a television game or contest, the offer of its products or services as prizes must not be accompanied by an advertising slogan.

### Other advertising rules

#### 41 | Briefly give details of any other notable special advertising regimes.

The Toubon Law requires the use of the French language within the French territory, in documents destined to inform the public on goods or

services such as offers, presentations, instructions for use, conditions of warranty, invoices and receipts (section 2).

A Circular dated 19 March 1996 specifies that this rule applies to the wording featured on labels and on the packaging of goods (section 2.1.1).

This Circular also provides that a translation into French of the foreign language is admitted if the French wording is as readable as the foreign language, but it is not compulsory for both wordings to be featured with the same presentation and characters.

## SOCIAL MEDIA

### Regulation

#### 42 | Are there any rules particular to your jurisdiction pertaining to the use of social media for advertising?

The Digital Economy Law requires that adverts, whatever the form (pop-ups, advert banners, etc), must be identified as such and therefore clearly distinguished from non-commercial information (article 20).

According to article L121-4-11° of the Consumer Code, a commercial practice using editorial content in any media to promote a product or service when the advertiser has paid for this content without clearly informing the consumer that it is paid-for content (within the content itself, in writing, with images or sounds clearly understandable by the consumer), is deemed misleading.

The digital communication of an influencer, or any other individual, on a social network platform (eg, a social post), will be deemed an 'advert' (and subject, in particular, to the French advertising self-regulation agency's recommendations, such as the obligation to identify the message or post as an 'advert' (eg, 'sponsored')) if the following criteria are met:

- compensation offered by the advertiser (payment or any other compensation, such as gifts);
- editorial monitoring by the advertiser, including a prior review of the post or message; and
- promotion, by the influencer, of the advertiser's product or service (speech, message or image with a promotional purpose).

On 13 December 2018, the European Advertising Standards Alliance published a recommendation dedicated to the best practices pertaining to influence marketing and influencers. This recommendation is available at [https://www.easa-alliance.org/sites/default/files/EASA%20BEST%20PRACTICE%20RECOMMENDATION%20ON%20INFLUENCER%20MARKETING\\_2020\\_0.pdf](https://www.easa-alliance.org/sites/default/files/EASA%20BEST%20PRACTICE%20RECOMMENDATION%20ON%20INFLUENCER%20MARKETING_2020_0.pdf).

#### 43 | Have there been notable instances of advertisers being criticised for their use of social media?

The case of *National Association for the Prevention of Alcoholism and Addiction v Ricard* (Supreme Court, 3 July 2013) is an example. The advertising campaign for the alcohol manufacturer (Ricard) included the offer of an app, as a free download (that required the consumer to have a Facebook account), allowing the user to see a video of the Ricard advertising campaign and to download codes leading to cocktail recipes using the alcoholic beverage, Ricard, which would be published on the user's Facebook wall.

The Supreme Court approved the Court of Appeal of Paris' ruling, which considered that, despite the fact that the user was sharing the advertiser's message on his or her Facebook wall, with his or her Facebook friends, the message remained an advert, subject, as such, to the Public Health Code, which, in particular, prohibits alcoholic beverages adverts on websites aimed at young people.

The Court of Appeal noted, in particular, that the use of hashtag references in the advertising campaign aimed at targeting young consumers interested in new technologies.

#### 44 | Are there regulations governing privacy concerns when using social media?

General rules applying to the protection of privacy (article 9 of the Civil Code) apply when social media is used.

### UPDATE AND TRENDS

#### Recent developments

#### 45 | Are there any emerging trends or hot topics in your jurisdiction?

On 19 October 2020, the French parliament enacted a law on child 'influencers', which regulates the commercial use of the image of children under 16 on online video sharing platforms. The child will be deemed a professional, meaning an employee of the person or entity whose activity consists of making audio-visual records featuring him or her as a main subject, to broadcast them on video-sharing platforms for profit. Child influencers will, therefore, benefit from the French labour code protective rules and their compensation will qualify as a salary. In addition (1) an administration authorisation will have to be sought before each shoot, except if the employer has obtained a licence for its activities and (2) the child's consent must also be obtained in writing if he or she is older than 13. In other words, child influencers with a for-profit activity must be declared workers.

When the activity of the child in question does not constitute an 'employment relationship', displaying the child's image on a video-sharing platform is not subject to the above-mentioned authorisation. Rather, a statement (*déclaration*) to the administrative body by the legal representatives is required, providing that the time committed, the number of videos produced, or the revenue earned exceeds certain thresholds. The administrative body provides recommendations to the legal representatives, such as recommendations relating to the risks associated with the display of the videos.

This law will enter into force on 20 April 2021.

#### Coronavirus

#### 46 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The French parliament enacted a law aimed at addressing the lockdown and covid situation, allowing movie producers to broadcast their movies on video on demand (VOD) platforms.

The general 'media chronology' rule in France provides that a movie is available on VOD platforms within four months of the broadcast of the movie in cinemas; with the aim of helping the cinema business.

Due to the pandemic, movie producers were allowed, on a case-by-case basis (assessed by the French Cinema Agency), to have their movies rendered available on VOD platforms at an early stage (this rule has been implemented in particular for movies that were still being broadcast in cinemas when the lockdown was ordered in France – in March 2020).

During the lockdown, the French SRO has issued a public communication to remind the market that the general principle of social responsibility (set forth by the International Chamber of Commerce or ICC Code) must be complied with by advertisers and ad agencies; as a result, advertisers must not, during the lockdown, create an urgency feeling among consumers, nor incite them to violate lockdown rules; and so, to stay in line with the current priority public health goal.

More generally, the French SRO reiterated that communication must remain responsible and must under no circumstances take advantage of the current health crisis through misleading advertising.

Ads for face masks are subject to very strict rules, which vary depending on the type of face mask concerned; for instance, FFP2 masks, which are dedicated to health professionals, are qualified as 'Individual Protection Equipment' and cannot be advertised to the public. On the contrary, surgical face masks aiming at protecting people surrounding the individual wearing the mask are deemed medical devices rated Class 1 (with a CE mark) and may be advertised to the public provided that certain conditions are met (eg, the ad must state that the mask is a medical device, feature the name of the manufacturer or contain a reference leading to the mask's instructions of use.)

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