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Online advertising and marketing Q&A: France

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France-specific information concerning issues that need to be considered when planning an online advertising campaign.

This Q&A provides jurisdiction-specific commentary on *Online advertising and marketing: Cross-border overview*, and forms part of *Cross-border commercial transactions*.

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Information concerning a company's business

1. What information concerning a company's business is required to be published on its website or provided in e-mails?

Various provisions of French law require general information to be communicated to third parties in the course of business. Most of these are general provisions and do not specifically apply to online activities. However, although not specifically drafted for online activities, these provisions must be complied with in the online world in so far as they relate to all types of commercial activities. Other more recently implemented provisions specifically address online communications. The scope and nature of information will vary according to the type of business and/or activities. Additional specific information may be required for specific activities.

The means for communicating the information are usually not specified in the applicable law. Generally, information should be made easily available to third parties, either on the main page of the website or through clearly identifiable hyperlinks.

General information

Any natural or legal person registered with the Commercial and Companies Register (*Registre du Commerce et des Sociétés* (RCS)) must publish the following information on their website:

- Their registration number, referred to as "number SIREN".
- The term "RCS", immediately followed by the place of registration.
- The address of their registered office. Companies with registered offices located outside France must also indicate their corporate name, corporate form and the registration number of the state where they have their registered office, if any.
- If applicable, that they are an entrepreneur *individuel à responsabilité limitée* (that is, where the entrepreneur assigns assets to their business that are distinct from their own assets, without creating a separate legal entity), or the initials "EIRL", as well as the nature of the business activity to which the assets are assigned and the name used to carry out the activity.

In addition to the above, any natural or legal person registered with the RCS must also publish the following on their invoices, order forms, prices and advertising documents as well as on any correspondence and receipts related to their business and signed by them or in their name (including e-mails):

- If applicable, that they are in the process of being liquidated (this also applies to companies registered outside France).
- If applicable, that they are managing the business premises on behalf of the business owner as a *locataire-gérant* or *gérant-mandataire*.

If they benefit from a business-plan support contract for the creation or takeover of a business activity, information relating to the legal person providing support (that is, its corporate name, address of its registered office and registration number).

(*Article R123-237, French Commercial Code.*)

Any breach of the above provisions is punishable, in particular, by a fine of up to EUR750 for natural persons (for example, the legal representative of a legal person) and five times this amount, that is, up to EUR3,750 for legal persons, and may attract civil damages as well (*Articles 131-13, 131-41 and 131-43, French Criminal Code*).

All deeds and documents issued by a company and intended for third parties, in particular letters (including e-mails), invoices, miscellaneous announcements and publications, must indicate the company name, immediately and legibly preceded or followed by, as the case may be:

- The company's corporate form.
- The amount of its share capital.

(*Article R123-238, French Commercial Code.*)

Since 2003, for some types of company, the public prosecutor's office as well as any interested party may request the presiding judge of a competent court to compel, subject to a periodic penalty payment if necessary, the legal representative of a company to indicate the company name, corporate form and share capital on all deeds and documents issued by the company (*Article L238-3, French Commercial Code*).

Additional information is required by Law no. 2004-575 of 21 June 2004 (LCEN) regarding "online communication services" (excluding "private communication services"). The following information must be made easily available to third parties by all publishers of online communication services:

- If the publisher is a natural person: first and last names, address of domicile, telephone number and, if registered with the RCS or Trades Register (*Répertoire des Métiers*), their registration number.
- If the publisher is a legal person: company name, address of registered office, telephone number and, if registered with the RCS or Trades Register, its registration number, the amount of its share capital and the address of its registered office.
- The name of the publication's director or co-director and the name of the editor-in-chief.
- The company name, address and telephone number of the company hosting the website.

(*Articles 6 III.-1 LCEN.*)

Any breach is punishable, in particular, by one year's imprisonment and a fine of up to EUR75,000 for natural persons (for example, the legal representative of a legal person) and five times this amount, that is, up to EUR375,000 for legal persons (*Article 6 VI.-2 LCEN* and *Articles 131-38 and 131-39, French Criminal Code*).

Anyone carrying out an online commercial activity (commerce électronique) (that is, the provision of goods or services by electronic means, including the provision of online information, commercial communications, research, access and data recovery tools, access to a communication or information hosting network, even where free of charge for users) must provide those for whom the provision of goods or services is intended with an easy, direct and permanent access to the following information:

- First and last names (natural person) or company name (legal person).
- The address of their business, their email address, as well as their telephone contact information so as to enable third parties to contact them effectively.
- If registered with the RCS or Trades Register, their registration number, amount of share capital and address of registered office.
- If they are subject to value added tax, their individual identification number (if applicable).
- If their activity is subject to authorisation, the name and address of the issuing authority.
- If they are a member of a regulated profession, a reference to the applicable professional rules, their professional title, the member state in which it was granted, as well as the name of the professional order or organisation with which they are registered.

(*Articles 14 and 19, LCEN.*)

Anyone carrying out such online commercial activity as defined in Article 14 of LCEN must, when they mention a price, provide clear and transparent information regarding such price and notably if taxes and delivery costs are included (*Article 19, LCEN*).

The above provisions are subject to enforcement by agents of the Directorate General for Competition Policy, Consumer Affairs and Fraud Control (*Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes (DGCCRF)*). The DGCCRF may impose the following sanctions (among others):

- An injunction to provide the abovementioned information.
- A public or non-public injunction to cease any illegal activity or to remove any illegal or prohibited clause.

Non-compliance with these injunctions is punishable by an administrative fine of up to EUR3,000 for natural persons and EUR15,000 for legal persons (*Articles L511-3, L511-7, L511-21, L521-1 et seq., L532-1, French Consumer Code.*)

The DGCCRF may enter into an agreement with the person in breach of its legal obligations or take the case to the competent civil or criminal court.

All companies must also indicate the name and address of the business as well as their value-added tax individual identification number on their invoices. Any breach is punishable, in particular, by:

- A fine of up to EUR75,000 for natural persons (for example, the legal representative of a legal person) and five times this amount, that is, up to EUR375,000 for legal persons (*Article L441-9, French Commercial Code*). The maximum of the fine may be increased to up to EUR150,000 for natural persons and EUR750,000 for legal persons in the event of a reiteration of the breach within two years from the date of the first definitive sanction (*Article L.441-9, French Commercial Code*).
- A fine of EUR15 in case of missing or inaccurate information on an invoice or similar document, within the limit of 25% of the total amount of the invoice (*Articles 242 nonies A and 1737 II, French General Tax Code*).

Additional specific information

Specific sets of rules may apply, depending on the type of business and/or activities. Additional compulsory information will be required if, for example, the website is designed to promote activities in the following fields:

- Insurance (for example as far as insurance brokers are concerned).
- Real estate (for example, real estate agents' professional registration number and place of delivery, amount of the financial warranty subscribed by the agent, and so on).
- Pharmaceutical companies (for example, name of the pharmacist responsible for the companies' activities, and so on).
- Banking (for example with regard to investment companies and/or credit institutions within the meaning of Articles L511-1 and L531-4 of the French Monetary and Financial Code).

General information requirements

2. What other requirements as to the provision of information apply to online advertising and marketing generally?

Consumer protection

Any online advertisement must be clearly identified as such and indicate the individual or entity on whose behalf it has been published (*Article 20, LCEN*).

Advertising communications made via electronic mail, in particular promotional offers such as discounts, premiums or gifts, as well as contests or promotional games must be clearly identifiable upon receipt or, if this is technically impossible, in the body of the message (*Article L122-8, French Consumer Code*). This type of message must provide a postal or electronic contact address, which would allow the addressee to send a request to stop the communications (*Article L122-8, French Consumer Code; Article L34-5, French Post and Electronic Communications Code*).

In addition, any conditions attached to promotional offers, as well as to the participation in contests and promotional games, if sent by electronic means must be clearly displayed and easily accessible (*Article L122-9, French Consumer Code*). These rules also apply to advertisements, offers, contests and games aimed at professionals (*Article L122-10, French Consumer Code*).

Any breach may result in an administrative fine of up to EUR3,000 for natural persons and EUR15,000 for legal persons (*Article L132-26, French Consumer Code; Article L34-5, French Post and Electronic Communications Code*) as well as in sanctions from the Electronic Communications and Postal Regulatory Authority (*Autorité de régulation des communications électroniques et des postes (ARCEP)*) (*Article L36-11, French Post and Electronic Communications Code*).

More generally, a breach of data protection laws may be sanctioned by the French Data Protection Authority (*Articles 20, 21 and 22, French Data Protection Act, see Voluntary regulation by public bodies*) and/or by the competent courts (*Articles L226-16 et seq., French Criminal Code*, see *Voluntary regulation by public bodies*), and may attract civil damages.

The French Consumer Code also provides for specific information to be communicated to consumers before they enter into a contract. The following information must be included in online offers made to consumers, in a clear and comprehensible manner:

- The main characteristics of the goods or services (*Article L111-1 1°, French Consumer Code*).
- The price and the specific terms of sale or performance of services (*Articles L111-1 2° and L112-1 et seq., French Consumer Code*).
- In the absence of an immediate performance of the contract, the date or the time by which the trader undertakes to deliver the goods or to perform the services (*Article L111-1 3°, French Consumer Code*).
- Information about the trader's identity, postal address, phone number, e-mail address and activities, if not already apparent from the context (*Article L111-1 4°, French Consumer Code;* see also, for a more detailed list of information to communicate to consumers: *Article R111-1, French Consumer Code*).
- Where applicable, information about the legal guarantees, the functionality and the relevant interoperability of digital content, the existence and implementation measures of contractual guarantees and other contractual conditions (*Article L111-1 5°, French Consumer Code;* see also, for a more detailed list of information to communicate to consumers: *Article R111-1, French Consumer Code*).
- The right to appeal to a consumer ombudsman (*Article L111-1 6°, French Consumer Code*; see also, for a more detailed list of information to communicate to consumers: *Article R111-1, French Consumer Code*).
- Other specific information regarding the goods, in particular the product's nature, substantial qualities, contents, quantity or origin, as well as the definition and conditions of use of words or advertising expressions in order to avoid any confusion (*Articles L412-1* and *R412-1, French Consumer Code*).

Distance contracts

In addition to the information listed above, which is not specific to distance contracts, the following information must be included in online offers made to consumers, in a clear and comprehensible manner:

Information relating to the right of withdrawal from the contract (*Article L221-5 2° to 5°, French Consumer Code*), including:

- if applicable, the conditions, time limit and procedures for exercising the right of withdrawal, along with a model withdrawal form:
  - information about the costs of returning the goods if the consumer is to bear these;
  - in case of withdrawal from a contract for services, the obligation of the consumer to pay for any costs associated with the services, if the consumer expressly demanded performance of these during the withdrawal period; and
  - if applicable, that there is no right of withdrawal, or the circumstances under which the consumer will lose their right of withdrawal.
- The trader's contact details.
- The costs of using the means of distance communication where applicable.
- Any applicable codes of conduct.
- If applicable, information relating to deposits and guarantees.
- The conditions for terminating the contract, information relating to dispute resolution and other contractual terms.

(*Article L221-5 6°, French Consumer Code*; see also, for a more detailed list of information to communicate to consumers: *Article R221-2, French Consumer Code*.)

In the case of distance contracts concluded by electronic means, the French Consumer Code also sets out information that must be reminded to consumers directly before they place an order (*Article L221-14, French Consumer Code*).

Any breach of the above provisions may result in an administrative fine of up to EUR3,000 for natural persons and EUR15,000 for legal persons (*Articles L131-1* and *L242-10, French Consumer Code*).

Transparency requirements regarding the purchase of advertising space

Rules regarding transparency in the purchase of advertising space are mainly set out in Law no. 93-122 of 29 January 1993 (Sapin Law) which was amended by Decree no. 2017-159 of 9 February 2017 in order to adapt the Sapin Law to digital adversiting services.

Any agency purchasing an advertising space must do so in the name and on behalf of the advertiser, in execution of the powers previously delegated by the advertiser in writing (*Article 20, Sapin Law*). Any breach of this provision may result in administrative fine of up to EUR30,000 for natural persons and EUR150,000 for legal persons (*Articles 25, Sapin Law and 121-2 and 131-39 of French Criminal Code*).

Under Article 23 of the Sapin Law, any sellers of advertising space must report to the advertiser the conditions under which the services were performed, within one month from the display of the advertisements.

Specific rules apply to digital advertising services which are defined as any services aimed at sharing messages on all devices connected to internet, such as computers, tablets, mobiles phones, televisions and digital billboards. Sellers of advertising space online are providing digital advertising services and, as such, must report the following to the advertiser:

- Global campaign price.
- Unitary price of each advertising space.
- Date and place of display of the advertisements.

(*Article 2 Decree no. 2017-156 of 9 February 2017.*)

In addition, in case of digital advertising campaigns that rely on real-time purchasing services methods, the sellers of advertising space are required to provide advertisers with information on the actual implementation and on the quality of their advertising services, as well as on the ways and means used in order to provide adequate protection of the image of the advertiser (*Article 3 Decree no. 2017-156 of 9 February 2017*).

This reporting obligation regarding digital advertising services does not apply to sellers of adversiting space established in another EU member state, if they are subject to similar reporting obligations based on national law.

Use of French language

Rules regarding the use of the French language are mainly set out in Law no. 94-665 of 4 August 1994 (Toubon Law), Decree no. 95-240 of 3 March 1995 and Government circulars issued on 19 March 1996 and 20 September 2001.

The use of the French language is compulsory in relation to the designation, offer, presentation, instructions to use, description of the scope and conditions of warranty of a good, product or service, as well as in invoices and receipts, and any written, oral or audiovisual advertising (*Article 2, Toubon Law*).

The 1996 circular further states that all documents intended for consumers and end-users (which can be natural or legal persons, excluding those acting for

purposes relating to their professional activities) must be in the French language (*Article 2.1.1, Circular of 19 March 1996*). This obligation is applicable to the marketing in France of goods, products and services irrespective of their origin (*Article 2.1.3, Circular of 19 March 1996*). In addition, in its reports to the French Parliament for 1997, the French language authority (*Délégation Générale de la Langue Française*) refers to the necessity of using the French language on websites aimed at consumers in the French market. In 1998, the French Minister of Culture and Communication clearly stated that mass mailings to, and online offers intended for, French consumers fall within the scope of the Toubon Law and must therefore be in the French language (*Ministerial response no. 2110, JOAN 22 June 1998, p.3394*).

Any breach of the above provisions may result in a fine of up to EUR3,750 for legal persons, with possible additional fines for delay in complying with the law (*Articles 1 and 4, Decree no. 95-240 of 3 March 1995*).

Information requirements related to electronic communications

In addition to the above, the LCEN has implemented several provisions of the Directive 2000/31/EC on electronic commerce and the Directive 2002/58/EC relating to privacy and electronic communications (information to be provided: the provisions of the LCEN mirror those of *Directive 2000/31/EC*; unsolicited commercial communications: the provisions of *Article L34-5 of the French Post and Electronic Communications Code* mirror those of *Directives 2002/58/EC* and *2000/31/EC*).

Cookies

Rules regarding cookies and other tracking tools for online advertising are mainly set out in the following instruments which implement the European directives known as the "Telecoms Package" (including *Directive 2002/58/EC* of 12 July 2002 as modified, known as the *Directive on privacy and electronic communications*):

- Law no. 78-17 of 6 January 1978 as amended from time to time (*French Data Protection Act*).
- Deliberation no. 2013-378 of 5 December 2013 on cookies and other tracking tools (*Cookie Deliberation*).
- Deliberation no. 2016-264 of 21 July 2016 on current and prospective customers management (Simplified Norm no. 48) issued by the French data protection authority (*Commission Nationale de l'Informatique et de Libertés* (CNIL)).

Under the French Data Protection Act (Article 82), a cookie (or other tracking tools) can be lawfully installed on the internet user's device provided that, before installing the cookie:

- The user has been informed in a clear and comprehensive manner about the purpose of this cookie and the means available to them to object to such cookie at any time.
- The user's consent has been obtained.

According to the French Data Protection Authority, the validity of such consent depends on the quality of the information provided to the user. Such information should be provided in the French language, in simple terms that are comprehensible to the general public, while being precise. The user's consent must be:

- Freely given (the consent must result from the free choice of the user, which implies that the user who refuses cookies should still be able to benefit from the services offered by the website, including access to it).
- Specific (it must refer to a specific cookie associated to a specific purpose).
- Informed (the information must be delivered before setting the cookies and must specify how to oppose to the use of such cookies).

The French Data Protection Authority further specifies that the period of validity of the user's consent to the use of a cookie should not exceed 13 months as of the date of the cookie's first installation on their device (*Article 5, Cookie Deliberation*).

The French Data Protection Authority recommends a two-step approach to obtaining the user's consent:

- First step: the user who lands on a website (home page or other pages) should be informed, through the use of a banner at the top of the webpage, about:
  - the specific purpose(s) of the cookies used by the website;
  - the possibility to oppose such cookies and to change cookie settings by clicking on a link provided in the banner; and
  - the fact that continuing using the website will be deemed to be a consent to the use of the cookies.
- The banner should not disappear before the user loads another webpage.
- Second step: the user should be informed in a simple and intelligible manner, for example, on a dedicated page, of the technical solutions available to them to accept or refuse all or some of the cookies for which users need to consent. This webpage should:
  - inform users about what the different tracking technologies are;

  - describe the purpose of each type of cookie; and
  - offer them the means to refuse the setting or reading of cookies.

(*Article 2, Cookie Deliberation*.)

The mechanism for accepting or refusing the use of cookies should be available:

- In French.
- For all tracking tools and should allow the user to accept or refuse those tracking tools by categories of purposes (for example, cookies for advertisement purposes, for interacting with social networks).
- On any devices, operating systems, applications and browsers.

In practice, a webpage should:

- Directly contain specific tools allowing the user to change the parameter settings (this is the French Data Protection Authority's preferred solution).
- Provide links to the relevant parameter-setting tools offered by third parties (for example, in case of third-party cookies). However, the French Data Protection Authority considers, for example, that a link to Google Analytics is not sufficient because Google sets a cookie before the user has consented to cookies and is not available for all devices and browsers.
- Explain how to change browser settings. However, if this solution is used (along with other solutions), the user should at least be advised not to block all tracking tools, as first party cookies may be essential to the functioning of the website and their refusal could lead to preventing the user from accessing some services.

These rules are not applicable to cookies or other tracking tools that are exclusively intended to enable or facilitate communication by electronic means or that are strictly necessary for the provision of an online communication service at the user's express request (*Article 82, French Data Protection Act; Article 1, Cookie Deliberation*). According to the French Data Protection Authority, the following types of cookie usually do not require informing the user and obtaining their prior consent:

- "Shopping cart" cookies to keep track of the shopping cart items.
- "Session identifiers" cookies, for the duration of the session or, in the case of persistent cookies, for a few hours.
- "Authentication" cookies to identify the user.
- Cookies that allow recording of the user's preferences (such as the user's language for websites that exist in several languages).
- Flash cookies that allow the proper functioning of the media player so the user can watch the multimedia content they requested.
- In certain conditions, audience measurement cookies that are strictly necessary to provide the service they requested (*Article 6, Cookie Deliberation; Article 7, Simplified Norm no. 48*).

Although not required by the law, the French Data Protection Authority nevertheless recommends providing information about their use in the website's privacy/cookie policy.

By contrast, the French Data Protection Authority considers that prior information and consent is usually required to install targeted advertising cookies, social network cookies generated by share buttons, and audience measurement cookies that do not meet the conditions to be exempted from the prior information and consent obligation (*Article 1, Cookie Deliberation*) (that is, the majority of audience measurement cookies according to the French Data Protection Authority).

The main sanctions for not complying with the French Data Protection Act and the French Data Protection Authority's recommendations are:

- Administrative sanctions by the French Data Protection Authority, for example, warning, notice to comply, fine of up to EUR10 million or to 2% of the total worldwide annual turnover, which can be raised up to EUR20 million or to 4% of the total worldwide annual turnoverdepending of the breach and/or injunction to cease data processing (*Articles 20, 21 and 22, French Data Protection Act*).
- Criminal penalties for collecting personal data by fraudulent, unfair or illegal means, for example, five years' imprisonment and a fine of up to EUR300,000 for natural persons or EUR1.5 million for legal persons along with other sanctions such as the publication of the court's decision in the media or its communication to the public by any means of electronic communications (*Articles 131-38, 131-39, 226-16 et seq., French Criminal Code*). In addition, non-compliance may attract civil damages.

A new regulation, which would replace the Directive on privacy and electronic communications, is under discussion and should be adopted by the European Union shortly. Applicable rules regarding cookies could therefore change in the upcoming months. Moreover, on 19 July 2019 the French Data Protection Authority published an update of the *Cookie Deliberation* with the new set of rules of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (GDPR) and has announced the creation of a study group regarding such cookie regulation. An adaptation period will be left to the

companies in order to give them time to integrate the new rules. Definitive version of the guidelines will be published in early 2020.

Information required for specific categories of products

Specific information must be included in advertisements in favour of certain categories of products or services, in particular.

Gambling and games of chance

Rules regarding gambling and games of chance are mainly set out in the French Internal Security Code and in Law no. 2010-476 of 12 May 2010 on the opening to competition and regulation of the online gambling and games of chance sector.

Any advertisement in favour of gambling and games of chance must contain the following warning message:

> "Jouer comporte des risques : endettement, dépendance... Appelez le 09-74-75-13-13 (appel non surtaxé)."
>
> ("Gambling is risky: debt, addiction... Call 09-74-75-13-13 (no overcharge)")

(*Article 1, Decree no. 2010-624 of 8 June 2010*; two other alternative but similar warning messages are proposed by this Decree.)

In case of online advertising, the warning message must appear together with the advertising message and must be displayed in such a way that the user who clicks on it is redirected to the website dedicated to helping players operated by the French National Public Health Agency (*Santé Publique France*). It must be presented in a manner that is accessible and clearly legible, respectful of its public health purpose and clearly distinguishable from the advertising message (*Article 6, Decree no. 2010-624 of 8 June 2010*). This website is currently *http://www.joueurs-info-service.fr/*.

Advertising is forbidden in publications, audiovisual communication services and audiovisual communication programmes, online public communication services and cinemas where such services are intended or accessible by minors (*Article 7, Law no. 2010-476 of 12 May 2010; Article 7, Decree no. 2010-624 of 8 June 2010*).

Any breach is punishable, in particular, by a fine of EUR100,000 that the court may increase to four times the amount spent for advertising the illegal operation (*Article 9, Law No 2010-476 of 12 May 2010*).

Household electrical goods

Any advertisement promoting household electrical goods must include a reference to the energy efficiency class of such goods (*Articles L412-1 and R412-43-1, French Consumer Code and Articles 3 and 6 of Regulation 2017/1369 of the European Parliament and of the Council of 4 July 2017 setting a framework for energy labelling*).

Phytosanitary products

Any advertisement promoting plant protection products must be accompanied by the following message, which must be easily legible and clearly distinguishable in relation to the whole advertisement:

"*Utilisez les produits phytopharmaceutiques avec précaution. Avant toute utilisation, lisez l'étiquette et les informations concernant le produit.*"

("Use plant protection products safely. Always read the label and product information before use.")

(*Article 66, Regulation (EC) no. 1107/2009 of the European Parliament and of the Council of 21 October 2009*.)

The French Rural and Sea Fishing Code further provides that any advertisement for plant protection products, with the exception of biocontrol products, must include the following message, in a clear and legible manner:

> "*Avant toute utilisation, assurez-vous que celle-ci est indispensable. Privilégiez chaque fois que possible les méthodes alternatives et les produits présentant le risque le plus faible pour la santé humaine et animale et pour l'environnement, conformément aux principes de la protection intégrée*" ("Before use, make sure that this is necessary. Whenever possible, prefer alternative methods and products with the lowest risk to human and animal health and to the environment, in accordance with the principles of integrated protection.")

The advertisement must also refer to the "*Ecophyto*" section of the French Ministry of Agriculture's website, so as to encourage users to seek more information on practices designed to use fewer plant protection products (*Articles L253-5 and D253-43-2, French Rural and Sea Fishing Code*).

Any breach of the above advertising requirements is punishable, in particular, by one year's imprisonment and a fine of EUR150,000, which may be increased up to 10% of the average annual turnover calculated on the last three annual turnovers (*Articles L253-16 and L253-18, French Rural and Sea Fishing Code; Articles 131-35 and 131-39 9, French Criminal Code*).

Consumer credit

Any advertisements promoting consumer credit, with the exception of radio advertisements, must contain the following message:

> "*Un crédit vous engage et doit être remboursé. Vérifiez vos capacités de remboursement avant de vous engager.*"
>
> ("A credit is a commitment and must be reimbursed. Check your ability to reimburse before you commit.")

(*Articles L312-5 and L312-8, French Consumer Code.*)

The French Consumer Code further details the information that must appear on any advertisement

promoting consumer credit (*Articles L312-6 et seq., French Consumer Code*).

Any breach of the above advertising requirements is punishable, in particular, by a fine of up to EUR1,500 for natural persons (for example, the legal representative of a legal person) and five times this amount, that is, up to EUR7,500 for legal persons, and may also attract civil damages (*Article R341-1, French Consumer Code; Articles 131-13, 131-41 and 131-43, French Criminal Code*).

Mobile phones

Any advertisement promoting mobile phones must contain the following message:

"*Le DAS (débit d'absorption spécifique) des téléphones mobiles quantifie le niveau d'exposition maximal de l'utilisateur aux ondes électromagnétiques, pour une utilisation à l'oreille. La réglementation française impose que le DAS ne dépasse pas 2W/kg.*"

("The SAR (specific absorption rate) of any mobile phone quantifies the level of maximal exposure of the user to electromagnetic waves, for use at the ear. French law requires SAR to be under 2W/kg.")

(*Article 2, Ministerial Order of 12 October 2010, NOR: SASP1011523A.*)

The DGCCRF is responsible for the implementation of this obligation (*Article 4, Ministerial Order of 12 October 2010*).

Tobacco products

3. How is the online advertising and marketing of tobacco products regulated?

Law no. 91-32 of 10 January 1991 against smoking and alcoholism (Evin Law), codified in the French Public Health Code, prohibits any direct or indirect propaganda or advertising of tobacco, tobacco products and ingredients used for the making of tobacco products such as tobacco, additives, cigarette paper, filter, glue and ink (*Article L3512-4, French Public Health Code*). The transposition of the European Tobacco Products Directive (*Directive 2014/40/EU*) has extended this prohibition to vapour products such as e-cigarettes and e-liquids (*Article L3513-4, French Public Health Code*).

In addition, any patronage (*parrainage*) or sponsorship (*mécénat*) is prohibited where it is undertaken by manufacturers, importers or distributors of tobacco products or where it is intended or has the effect of promoting, directly or indirectly, tobacco, tobacco products and ingredients thereof or vapour products (*Articles L3512-4* and *L3513-4, French Public Health Code*).

Indirect propaganda or advertising is defined as any propaganda or advertising promoting an organisation, a service, an activity or a product other than tobacco, a tobacco product or an ingredient thereof, which by its graphics, presentation, use of a trade mark, advertising emblem or of another distinctive sign, evoke tobacco, a tobacco product or an ingredient thereof (*Article L3512-5, French Public Health Code*).

The Court of Cassation has held that any kind of commercial communication (including on a website), which is intended or has the effect of promoting, directly or indirectly, tobacco or a tobacco product, is prohibited (*Court of Cassation, 10 January 2008, no. 07-13116; Court of Cassation, 9 March 2010, no. 08-88501; Court of Cassation, 18 May 2016, no. 15-80922*).

The Criminal Chamber of the Court of Cassation has also held that any direct or indirect propaganda or advertising of tobacco or tobacco products constitutes a continuous infringement, whatever the medium (including if the advertisement is published on the internet). The judges of the Court of Cassation have considered that the breach continues as long as the advertisement remains accessible (*Court of Cassation, 17 January 2006, no. 05-86451; Court of Cassation, 26 September 2006, no. 05-87681*).

The prohibition on tobacco advertising does not apply, under certain conditions, to:

- Publications and online communication services edited by professional organisations of producers, manufacturers and distributors of tobacco products and/or vapour products for their members, specialised professional publications listed by the French Ministries of Health and Communication, and online communication services made available only to professionals in the field of production, manufacture and distribution of tobacco products and/or vapour products (*Articles L3512-4 and L3513-4, French Public Health Code; Articles 1 and 2, Order of 4 July 2016*).
- Print publications, and online communication services made available to the public, by persons established in a non-EU or non-EEA country, where those publications and services are not mainly intended for the European market (*Articles L3512-4* and *L3513-4, French Public Health Code*).
- Tobacco shops signs (*Article L3512-4, French Public Health Code; Article 1, Order of 6 September 2016*).
- Broadcasting by TV channels of motorsport competitions taking place in countries where advertising for tobacco is authorised (*Article L3512-6, French Public Health Code*).
- Small posters relating to vapour products, which are placed inside establishments marketing them and which are not visible from the outside (*Article L3513-4 of the French Public Health Code*).

As regards the exception relating to the broadcasting of motorsport competitions taking place in countries where advertising of tobacco is permitted (*Article*

L3512-6, French Public Health Code), the Criminal Chamber of the Court of Cassation has specified that this exception aims at satisfying information needs, in real time or near-real time, but does not extend to rebroadcasting images several hours or several days after the competition has taken place (*Court of Cassation, 14 May 2008, no. 07-87128*).

A Government circular issued on 28 March 2012 states that the representation of elements related to tobacco, or smokers, in artistic works and/or historical or news images, is prohibited only if there is direct or indirect propaganda, patronage or advertising in favour of tobacco, that is, if words and images are used to convey a positive representation of tobacco or a positive image of smoking. It further provides that three criteria should be met in order to determine that the representation of people using tobacco products on goods or in cultural or artistic works (for example, in a movie, on stamps) does not constitute unauthorised indirect propaganda or advertising:

- The campaigns should originate from advertisers having no link whatsoever with the tobacco industry or distribution, and should have an exclusively cultural or artistic purpose.
- Those who are shown should be historical figures, or well-known persons whether alive or not (however, the representation in the form of photographs of a well-known living person together with a tobacco product is allowed for old photographs only), or should appear in works of art that are an integral part of an advertising campaign for an artistic event.
- The tobacco products that are represented and used in the cultural or artistic works should be inseparable from the image and personality of the persons appearing therein.

(*Circular no. DGS/MC2/2012/136 of 28 March 2012 on the representation of artistic and cultural works and images of smokers.*)

The Criminal Chamber of the Court of Cassation recently held that showing people who smoke cigarettes in a TV show, the concept of which is to gather people with a certain notoriety around a dinner table to debate on current topics, does not constitute prohibited advertising for tobacco (*Court of Cassation, 21 February 2017, no. 15-87688*).

Any prohibited propaganda or advertising for tobacco, tobacco products or ingredients thereof, or for vapour products, is punished, in a non-exhaustive manner, by a fine of up to EUR100,000 for natural persons and five times this amount that is, EUR500,000 persons for legal persons. It may also attract civil damages (*Articles L3515-3* and *L3515-6, French Public Health Code; Articles 131-38 and 131-39, French Criminal Code*).

An anti-tobacco association filed a criminal suit against the e-commerce platform "marche.fr" in particular on the basis of the prohibition of direct propaganda or advertising of tobacco and tobacco products. This platform allows its users to post ads to sell products and some users used this service to sell tobacco products. The legal issue was whether the platform was liable for this type of ad promoting tobacco products. The judges examined the status of the marche.fr platform under the LCEN (*Article 6, LCEN*) and considered that the marche.fr platform had the status of a hosting provider. Consequently, the platform may not be held liable for the content hosted on its website as long as it is not aware of it. Nevertheless, if the platform is informed that illegal content is posted by one of its users, the platform must immediately react and delete the content in order not to be held liable (*Court of Appeal of Paris, 24 February 2010, no. 09/01891*).

Alcoholic drinks

4. How is the online advertising and marketing of alcoholic drinks regulated?

The Evin Law, codified in the French Public Health Code, also prohibits direct or indirect propaganda or advertising of alcoholic products except in certain specific situations (see below) (for example, on television, in cinemas, in stadiums and so on) (*Article L3323-2, French Public Health Code*).

Also, any patronage (*parrainage*) is prohibited where it is intended or has the effect of promoting, directly or indirectly, alcoholic beverages (*Article L3323-2, French Public Health Code*).

Indirect propaganda or advertising has the same meaning in relation to alcoholic beverages as it does in relation to tobacco products (see *Question 3*) (*Article L3323-3, French Public Health Code*).

There are limited exceptions to this general prohibition. Direct or indirect advertising of alcoholic beverages is authorised, under certain conditions:

- In the written press, except for publications aimed at young people.
- On the radio within specific time slots.
- On posters or signs, except in some restricted areas, as well as on small posters or products inside specialised sales areas.
- In messages (including phone messages), commercial printing, catalogues and brochures sent by producers, manufacturers, importers, merchants, dealers or warehouse keepers.
- On vehicles used for normal beverage delivery operations.
- To promote traditional festivals and fairs devoted to local alcoholic beverages.

- To promote museums, universities, brotherhoods or courses of oenological initiation of a traditional nature as well as in favour of presentations and tastings.
- On products strictly reserved for the consumption of beverages containing alcohol.

(*Article L3323-2 1° to 8°, French Public Health Code.*)

Law no. 2003-709 of 1 August 2003 on sponsorship (*mécénat*), associations and foundations, codified in the French Public Health Code, also authorises organisers of sponsorship events to advertise their participation exclusively in writing in documents distributed on the occasion of such event or in memorial media on the occasion of operations of enrichment or restoration of the natural or cultural heritage (*Article L3323-6, French Public Health Code*).

Law no. 2009-879 of 21 July 2009 (Bachelot Law), codified in the French Public Health Code, introduced the legal framework for advertising alcoholic products on the internet. In addition, the French Professional Advertising Regulation Authority (*Autorité de Régulation Professionnelle de la Publicité, formerly Bureau de Vérification de la Publicité*) issued a recommendation in June 2010, updated on 20 April 2015, dealing with the rules applicable to advertising alcoholic products, which applies to the internet.

Any direct or indirect propaganda or advertising of alcoholic beverages is authorised via online communication services, but is prohibited:

- On websites which by their nature, their appearance or object appear to be primarily aimed at young people.
- On websites published by sports associations, companies and federations and professional leagues as defined by the French Sport Code.
- The method of propaganda or advertising must not be "intrusive" (for example, a pop-up window) or "interstitial" (a message of few seconds displayed between two pages of presentation of a website) (*Article L3323-2 9°, French Public Health Code, as amended by the Bachelot Law*).

The French Public Health Code authorises, within strict limits, advertising on the qualitative characteristics of certain alcoholic products such as wine (*Article L3323-4, French Public Health Code, as amended by the law no. 2005-157 of 23 February 2005*). The ad content must strictly comply with Article L3323-4 of the French Public Health Code. Any promotional messages, including on the internet, whose purpose is the promotion of alcoholic beverages, must both:

- Only contain information that is expressly permitted by these provisions for example, the degree of alcohol, origin, name, composition of the product, name and address of the manufacturer, agents and custodians, as well as the method of preparation, the conditions of sale and the way to drink the product, or objective references related to the colour and olfactory and gustatory characteristics of the product.

  It is worth noting that contents, images, representations, descriptions, comments or references relating to a region of production, toponymy, geographic indication or reference, terroir, itinerary, production zone, know-how, history or cultural, gastronomic or landscape heritage related to alcoholic beverages with a quality or origin identification or protected under the French Rural and Sea Fishing Code such as wine, cider and perry, are not considered as advertising or propaganda (*Article L3323-3-1, French Public Health Code; Article L665-6, French Rural and Sea Fishing Code*).
- Include the following health message:

  "*L'abus d'alcool est dangereux pour la santé.*"
  ("Alcohol abuse is dangerous for health.")

(*Article L3323-4, French Public Health Code.*)

The French courts have clarified that such an advertisement must be informative only, and cannot constitute an encouragement to consume alcohol. Case law on what constitutes encouragement to consume alcohol includes the following decisions:

- The Court of Cassation has held that two posters in the Paris metro, showing a bare-chested muscled man wearing a Scottish kilt, with the slogan "William Lawson's, too Scottish for you?", expressly refer to the manliness of the Scottish man and is not related to any of the information authorised by Article L3323-4 of the French Public Health Code (*Court of Cassation, 29 November, 2005 no. 05-81189*).
- The Court of Cassation has held that three posters in the Paris metro, showing men in 18th century costumes on a port quay with barrels labelled "Dublin", in a distillery looking at the content of a glass, and in a cellar among barrels labelled "John Jameson 1780", with the slogan "Jameson the Irishman", were giving a glamorous image of Ireland, with elements such as travel and old manufacturing methods, which are foreign to the strict indication of the product's origin, composition and manufacturing method (*Court of Cassation, 19 December 2006, no. 05-87268*).
- The Court of Appeal of Paris has held that the slogan "for a fresher world" to promote beer constitutes an encouragement to consume alcohol (*Court of Appeal of Paris, 13 February 2008, no. 07/17589 and no. 08/00245*).
- The Court of Cassation has held that an advertisement published in a science magazine, showing two clinking glasses of Cabernet d'Anjou wine with a slogan about youth and delicacy, was referring without ambiguity to human behaviour and was clearly encouraging consumption of alcohol

(*Court of Cassation, 22 May 2008, no. 07-14984*).

- The Court of Cassation has held that an internet contest's prize consisting of a rare and valuable bottle of whiskey, and the use of words and expressions in relation thereto such as "patience", "choice", "alchemy" and "masterpiece", glorify alcohol by presenting its consumption as elitist and therefore encourage consumption of alcohol (*Court of Cassation, 20 October 2011, no. 10-23509*).
- In the Ricard case, the Court of Appeal of Paris pointed out that commercials in favour of alcoholic beverages conveyed on an internet social network are not illegal per se, to the extent that the social network does not primarily target minors. Nevertheless, these commercials were deemed illegal because they hinted that alcohol consumption facilitates relationships and social networking. The specific app designed and distributed by Ricard on the social network was also too intrusive, as downloading it triggered different messages to be sent to the friends of the initial downloader (*Court of Appeal of Paris, 23 May 2012, no. 11/15591, confirmed by Court of Cassation, 3 July 2013, no. 12-22633*).
- In 2014, the Court of First Instance of Paris exonerated Heineken in connection with the advertising of two beer products on its Facebook page, pointing out that the advertisement was limited to the composition of the products and their olfactory and gustatory qualitative characteristics, and therefore did not constitute an encouragement to consume alcohol (*Court of First Instance of Paris, 20 February 2014, no. 13/59661*).
- The Court of Cassation has held that posters showing happy young people raising a glass to promote Bordeaux wines were associating these wines with an image of conviviality likely to encourage consumers to drink such products (*Court of Cassation, 23 February 2012, no. 10-17887*). However, in that same case, the Court of Cassation later held that Article L3323-4 of the French Public Health Code does not prohibit the representation, in an advertisement, of a charismatic character holding a glass of wine where this character is designated as a wine producer or marketer, who participated in the making or marketing of the product, rather than a consumer (*Court of Cassation, 1 July 2015, no. 14-17368*).

In 2018, the Court of Appeal of Paris exonerated Kronenbourg in connection with an advertisement representing a phoenix with the following slogan « *The intensity of a legend* », pointing out that the advertisement was limited to the origin of the beverage (through the representation of Grimbergen Abbey whose emblem is the phoenix), and therefore did not constitute an encouragement to consume alcohol. The Cour of Appeal also held that the entire content of the advertising does not have to be purely objective (*Court of Appeal of Paris, 13 December 2018, No 17/03352*).

Any breach of then above provisions is punishable, in particular, by a fine of EUR75,000, which may be increased up to 50% of the advertising costs (*Article L3351-7, French Public Health Code*).

Voluntary regulations and codes of practice

5. What are the main areas of voluntary regulation or self-regulatory codes of practice that apply to online advertising and marketing?

Voluntary regulation by public bodies

Commission Nationale de l'Informatique et des Libertés (CNIL). The French Data Protection Authority (*Commission Nationale de l'Informatique et de Libertés or CNIL*) is an independent administrative authority, created in 1978, to exercise control over compliance with Law no. 78-17 of 6 January 1978 as amended from time to time (*French Data Protection Act*).

The CNIL has a significant influence on the French government and parliament and can publish opinions regarding new bills on data protection before their adoption (*Law no. 2009-56 of 12 May 2009*). The CNIL has, in particular, the power to make recommendations, and publishes an annual report of activity. The French Data Protection Act has been amended by Law no. 2004-801 of 6 August 2004, Law no. 2016-1321 of 7 October 2016 for a digital Republic and then Law no. 2018-493 of 20 June 2018, which have incorporated the provisions of the GDPR.

The CNIL has issued a number of recommendations about online advertising and marketing (for example, *Deliberation no. 97-012 of 18 February 1997* on direct marketing).

On 22 November 2005, the CNIL issued a specific recommendation relating to websites set up by individuals as part of strictly personal activities, such as blogging, that collect and/or publish personal data. Although the CNIL requires that some information must be communicated to data subjects regarding the collection and/or publication of their personal data, such as:

- The name of the data controller.
- The purpose of the data processing.
- Right of access, rectification and opposition to the processing of their personal data.

The CNIL further considers that personal data collected through a personal website can only be communicated to third parties in the context of private activities, after the data subject has been informed and is in a position to oppose this communication. This means that bloggers who promote a company's product in a sponsored article should not be able to transmit their

readers' personal data to that company. They should also expressly mention the advertising nature of their article and the identity of the advertiser (*Articles L121-2 3 and L121-3, French Consumer Code*).

As regards e-commerce websites, the CNIL issued a recommendation on current and prospective customers management on 7 June 2005, updated on 21 June 2012 and 21 July 2016 to take into account the development of e-commerce and prospecting methods (*Deliberation no. 2016-264 of 21 July 2016or Simplified Norm no. 48*). A simplified norm is a set of obligations that a person in charge of processing personal data agrees to comply with in order to benefit from a simplified procedure for declaring the data processing to the CNIL. With the application of the GDPR, simplified norms are intended to disappear and will be replaced by standards (*référentiels*) adopted by the CNIL. The 2016 update substantially changed Article 6 of Simplified Norm no. 48, in particular regarding commercial prospection, and added part of the CNIL's recommendation regarding cookies and other tracking tools (*Deliberation no. 2013-378 of 5 December 2013 on cookies and other tracking tools*) as well as online payment (*Deliberation no. 2013-358 of 14 November 2013*).

The CNIL can also impose penalties where a personal data processing does not comply with the French Data Protection Act. The most common penalties are the following:

- Public or non-public warning.
- Public or non-public fine up to EUR10 million or to 2% of the total worldwide annual turnover, which can be raised up to EUR20 million or to 4% of the total worldwide annual turnover depending of the breach.
- Injunction to cease the processing of personal data.
- Withdrawal of an authorisation to process personal data.

(*Articles 20, 21 and22, French Data Protection Act.*)

For example, the CNIL has issued public warnings and/or fines against:

- Yatedo, a recruitment website that aggregates personal data found on various social networks to set up individual profiles (*Deliberation no. 2012-156 of 1 June 2012*). The CNIL has specifically pointed out the lack of updates carried out by Yatedo regarding this personal data.
- Fnac Direct, a well-known e-commerce website in France. The website did not provide a sufficient level of security for clients' bank data, nor defined a reasonable duration for the maintenance of this data within its database (*Deliberation no. 2012-214 of 19 July 2012*).
- Regime Coach, the publisher of a famous sport and dietetic coaching website. The website did not inform clients of data processed, nor provided a sufficient level of security for their personal data (*Deliberation no. 2014-261 of 26 June 2014*).
- Optical Center, a well-known optical corporate, was sanctioned by a EUR50,000 fine because it did not sufficiently ensure the security and confidentiality of its clients' data (*Deliberation no. 2015-379 of 5 November 2015*).
- Facebook, was given three months to comply with the French Data Protection Law. The CNIL considered there was a lack of transparency with the use of the collected data. Facebook also transferred personal data to the US. And finally there was no mechanism allowing users to oppose the use of their data for advertising purpose (*Deliberation no. 2016-007 of 26 January 2016*). As Facebook failed to comply with the French Data Protection Law, it was fined EUR150,000 by the CNIL (*Deliberation no. SAN-2017-006 of 27 April 2017*).
- Hertz France has been fined EUR40,000 due to a bug of its service provider in charge of the development of its website causing the violation of personal data. The CNIL stated that Hertz France failed in its security obligation towards its subcontractor (*Deliberation no. SAN-2017-010 on 18 July 2017*).
- Ouicar, a car rental website between individuals, was publicly warned because clients personal data had been online and accessible by anyone without any security measures (*Deliberation no. SAN-2017-011 of 20 July 2017*).
- Darty, a company specialized in the sale of household appliances, was sanctioned by a EUR100,000 fine because it did not sufficiently ensure the security of its clients' personal data (*Deliberation no. SAN-2018-001 on 8 January 2018*).
- Optical Center has also been fined EUR250,000 because it did not sufficiently ensure the security of its clients' personal data: by entering several URLs in the browser, any person could have access to invoices of clients (*Deliberation no. SAN-2018-002 on 7 May 2018*). The Council of State (Conseil D'Etat) has reduced the amount of the fine to EUR200,000 due to the speed with which the company had remedied the lack of security of its website (*Council of State, 17 April 2019 no. 422575*).
- Uber France was fined EUR400,000 fine because of a 2016 data breach that affected 57 Millions users (*Deliberation no. SAN-2018-011, 19 December 2018*). The CNIL said that this data breach could have been avoided if certain basic security measures had been put in place by Uber.

Based on the GDPR, the CNIL has imposed a financial penalty of EUR50,000 against Google LLC for lack of transparency, inadequate information and lack of valid consent regarding the ads personalization (*Deliberation no. SAN-2019-001, 21 January 2019*).

The Data Protection Directive 95/46/CE has been substantially modified by French Law no. 2016-1321 of 7 October 2016 on a digital Republic and the GDPR. The GDPR is applicable since 25 May 2018 in the whole of the European Union. This new regulation addresses several fundamental new changes for the organisations (companies and/or public authorities), including in relation to:

- **European citizens.** It enhanced more rights regarding data subject's personal data and a more effective control of their data: right to erasure (right to be forgotten) and right to restriction of processing, right of data portability, right of information before data process, (transparency), rectification and access, absolute right to object for profiling or direct marketing, and so on.
- **European companies.** All procedures have been simplified particularly with the creation of a single contact regrouping all European data protection authorities. They will also have a "toolbox" with new tools (code of practice, certification).
- **Accountability and data governance obligations.** Organisations must keep a record of their processing activities (the type of data processed, their purposes, and so on). Organisations must implement technical and organisational measures to show that they have considered and integrated data compliance measures into their data processing activities such as pseudonymisation (Privacy by Design). Organisations will assess the risks regarding data privacy by running a Privacy Impact Assessment (PIA) and nominating a Data Protection Officer (DPO) notably where the GDPR states that it is mandatory (that is, sensitive data or special categories of data under the GDPR, monitoring activities, and so on).
- **Personal data breaches and notification.** Organisations are now subject to a general personal data breach notification regime (drafting or updating internal breach notification procedures, including incident identification systems and incident response plans).
- **European data protection authorities.** The regulation asserts their competence and increases their power, particularly their sanctioning power with the power to issue administrative penalties up to EUR20 million or 4% of the total worldwide annual turnover of the concerned company, whichever is the higher.

Voluntary regulation by private associations

***Autorité de Régulation Professionnelle de la Publicité* (ARPP).** The ARPP (previously referred to as *Bureau de Vérification de la Publicité*) has members representing advertisers, media and advertising agencies as well as trade associations, and was created to promote legal, decent, honest and truthful advertising by way of self-regulatory schemes. The ARPP formulates general and specific guidelines and codes in the advertising field, which are regularly updated. It gives advice about advertisements and deals with complaints from both consumers and competitors. Where there is non-compliance with its decisions, after giving notice to the advertiser, the ARPP can ask the media concerned to cease publication of the offending advertisement.

The ARPP adopted recommendations about online advertisements in December 1999 (modified in December 2010), based on the ICC guidelines of 1998:

- The advertiser and the advertising content of the message must be clearly identified.
- Advertisements must be honest, decent, truthful and fair.
- Advertisements must respect human dignity and the potential sensitivities of a worldwide audience.
- Advertisements must also respect privacy and applicable data protection laws (the users must be able to identify unsolicited an advertisement as such when they receive it).
- Advertisements directed at children must respect the ICC guidelines and the ARPP's recommendation about children and teenagers.
- If applicable, the user must be informed that they are required to pay for access to a message or a service and that the price would exceed the usual connection charge.

On 24 May 2005, the ARPP issued a recommendation regarding advertising on the internet.

In 2011, the ICC guidelines were amended to cover the entire interactive digital media sector. For the first time, rules on electronic behavioural targeting were adopted.

In 2017, ARPP compiled 13 crosscutting recommendations that are applicable to any advertising regardless of the business sector (for example, recommendations on digital advertising or advertising vocabulary) and 15 sectorial recommendations that are applicable to the advertising of specific business sectors (for example, recommendations on advertising for alcohol or gambling and games of chance) in the ARPP Code.

In 2018, ICC revised its ICC Advertising and Marketing Communications Code to enhance guidance on distinguishing marketing communications content from true editorial and user generated content and in order to expand its scope to include emerging mediums and participants, such as social media, artificial intelligence-enabled marketing, market influencers, bloggers, vloggers, affiliate networks, data analytics and ad tech companies.

ARPP's recommendations are only enforceable against its members, who may be excluded in case of non-compliance. However, the recommendations seem to be followed by all professionals in the sector concerned and even by the French courts.

Interactive Advertising Bureau France (IAB France). IAB France is the French arm of the Interactive Advertising Bureau, created in 1998 with three missions:

- Structuring the internet communication market.
- Promoting its use.
- Optimising its efficiency.

It draws up standards and best practices in the area of online advertising. In particular, in June 2001, IAB France issued guidelines on relationships between buyers and sellers of online advertising and recommendations on sizes of online banners. In January 2006, IAB France formulated several recommendations on video advertising on the internet, such as the Convergence of Advertising on Internet Charter (17 April 2008). It also regularly publishes white papers on key issues of the online advertising sector, for example on performance marketing in 2013, on native advertising in 2014 or on digital audio in 2016.

***Fédération des Entreprises de Vente à Distance* (FEVAD).** FEVAD, created in 1957, is the representative French professional organisation of distance selling companies. FEVAD has promoted several codes and charters, in particular concerning databases on consumer behaviour and distance selling. FEVAD monitors compliance with these texts by its members and can impose sanctions on them.

The main guidelines are the deontological code of e-commerce and distance selling contracts (*Code déontologique du e-commerce et de la vente à distance*), last updated in September 2015. FEVAD has also adopted important guidelines such as the guide of good practices concerning the distribution of electric and electronic products on the internet in 2011 (*Guide de bonnes pratiques relatif à la distribution de produits électriques et électroniques sur Internet*), the guide of good practices concerning the use of advertising cookies in 2012 (*Guide de bonnes pratiques concernant l'usage de cookies publicitaires*), the e-mail marketing policy (*Charte de l'e-mail marketing*),guidelines on e-purchases (*Achats en ligne : suivez le guide!*) and e-commerce policy (*Charte sur l'e-commerce*) in 2019.

FEVAD has also launched self-regulatory solutions. In 1999, the FEVAD launched with the Federation of Trade Distribution Companies (*Fédération du Commerce et de la Distribution* or "FCD") the "L@belsite" certification label to obtain consumer confidence in relation to the certified members' advertising and marketing methods. This certification label does not exist anymore. Since 2013, the FEVAD has developed an e-commerce mediation service. This is a service of amicable settlement of the disputes with consumers. Anyone who has not been able to solve a problem with a FEVAD member can file an application before the FEVAD e-commerce mediator under the terms of the Trade Mediation Charter of the FEVAD. Since July 2016, French and European public authorities have approved the FEVAD e-commerce mediator service. It is part of the official list of French mediators who comply with the legal provisions in force in the field of consumer mediation. This French recognition was accompanied by official European recognition, as the European Commission has referenced FEVAD's mediator e-commerce system as an accredited European mediator.

***Association Française des Prestataires de l'Internet* (AFPI).** The AFPI (previously referred to as *Association des Fournisseurs d'Accès et de services Internet or AFA*), created in 1997, is the French association of internet service providers (ISPs, hosting providers, browsers, etc.). Its purpose is to promote the development of internet services and to inform the public and professionals about access to internet services. Under guidelines formulated by the AFPI on its members' practices, access providers must deploy technical means to detect the practices of unsolicited e-mails and to limit the transmission of these e-mails. Moreover, access providers may detect contents that are manifestly illegal by:

- Examining users' claims.
- Monitoring pages most frequently consulted.
- Automatic detection of suspicious words.

If the online content or the behaviour of the user is contrary to its general conditions of use, the access provider, after giving notice to the user, can delete the content or terminate the subscription.

***Association des Services Internet Communautaires* (ASIC).** The ASIC is a French association created at the end of 2007 by most of the internet's key players, such as AOL, Dailymotion, Google, Price Minister and Yahoo. It also has Airbnb, Amazon, Deezer, eBay, Facebook, Meetic, Microsoft, Netflix, Skype, and Twitter, among its members. Its purpose is to promote the development of Web 2.0. and guidelines of use to protect users', in particular children's, personal data and freedom of expression. Moreover, it is dedicated to fighting counterfeiting on the internet. The ASIC is also expected to contribute to the brainstorming following the decisions of the French courts regarding the

liability of website hosts and editors in case of any publication of a content by a user. For example, in 2008, ASIC took part in the consultation launched by the European Commission regarding online creative content. The ASIC presents itself as the most powerful lobby in France, and is particular active regarding personal data and copyright laws and regulations.

Collectif de la Performance et de l'Acquisition **(CPA).** Created in 2008, the CPA is the trade union for the digital marketing performance sector, which constitutes the core of any digital acquisition strategy. The CPA represents expert editors and service providers offering independent, tailored solutions to the digital marketing sector (advertisers and etraders). Through its work (White papers, Quality charters, Recommendations, Events & Networking), the CPA has four major aims:

- To regulate a fastgrowing, constantly changing market.
- To provide information on best practices in digital acquisition.
- To ensure that these practices are implemented within a statutory framework.
- To represent the rights and interests of its members.

Linking

6. Which of the following legal remedies are or may be available in respect of unauthorised linking to a website:

- **Passing off;**
- **Unfair competition;**
- **Registered trade mark infringement;**
- **Copyright infringement;**
- **Database right infringement;**
- **Breach of contract; or**
- **Any others?**

Passing off

The French courts have created a similar remedy (*parasitisme*) to passing off, which constitutes an act of unfair competition. Individuals or companies may be held liable where they seek to benefit from the goodwill attached to another's product or service, in order to make profit out of such goodwill. The website owner must prove their goodwill, a misrepresentation by the linker, and damage suffered by them as a result of the misrepresentation. The likelihood of confusion and an act of unfair competition do not need to be demonstrated (unlike in the case of unfair competition, see *Unfair competition* below).

In 2010, the Court of First Instance of Nanterre held that, in the absence of any omission or wrongful inaccuracy, the use by the defendant on their websites of a widespread contextual advertising system (AdSense) offering, on the webpage describing the plaintiff's software, sponsored links leading to websites of other software editors, does not constitute an act of unfair competition nor passing off (*Court of First Instance of Nanterre, 25 March 2010, no. 08/14797*). The Court of Appeal of Versailles confirmed this ruling and added that it is not demonstrated that the defendant had any connection whatsoever with the advertisers, AdSense being based on contextual advertising, which is widely used, such that advertisements are provided by Google and automatically associated to the websites (*Court of Appeal of Versailles, 1 December 2011, no. 10/03096*).

In 2014, the Court of Appeal of Paris held that the intensive use of keywords based on the company name of a competitor in the context of the creation of backlinks, to improve natural referencing in search engines, constitutes passing off (*Court of Appeal of Paris, 28 March 2014, no. 13/07517*).

In 2017, the Commercial Court of Belfort also held that the implementation of backlinks that are not in accordance with good practice can constitute an act of unfair competition and passing off (*Commercial Court of Belfort, 17 October 2017*).

Unfair competition

There is no specific law in France imposing liability on those who engage in acts of unfair competition. Such liability is based on general principles of tort law as set out by case law on the basis of Article 1240 of the French Civil Code.

As a general rule, to establish a cause of action and bring a lawsuit on the basis of unfair competition, the plaintiff must prove:

- That an act of unfair competition has been committed (such as a risk of confusion with the products and services of the plaintiff or disparagement of the plaintiff).
- That the act was the proximate cause of an actual damage.
- The damage suffered.

For example, the Court of Appeal of Paris held that by providing a link on its official website to a third party's "anti-NRJ" website, the radio station Europe 2 had committed an act of unfair competition against its competitor NRJ (*Court of Appeal of Paris, 19 September 2001, NRJ SA v. Société Europe 2 Communication, no. 1999/21382*).

In a case involving the Google AdWords service, a French court ruled in May 2011 that Google was liable on the grounds of unfair competition as it technically

contributed to the confusion generated in the mind of the interested public (*Court of Appeal of Paris, 11 May 2011, Google France et Inc/Cobrason, Home Cine Solutions*). The decision was heavily criticised and overruled by the Court of Cassation, as it did not refer to the hosting exemption provided by LCEN and Directive 2000/31 of 14 November 2011 (*Court of Cassation, 29 January 2013, no. 11-21011* and *11-24713:* in relation to the competitor, the Court of Cassation underlined that the Court of Appeal failed to demonstrate the risk of confusion).

In relation to unfair competition, there are also a few rulings dealing with deceptive practices on the internet. In a case involving a comparison-shopping website, whose remuneration depended on the number of "clicks" recorded for each hyperlink to third party websites, which failed to provide complete and updated information on the referred offers, the Commercial Chamber of the Court of Cassation held that the adequate test for showing deceptive practices consists in demonstrating a substantial modification of the consumer's economic behaviour as a result of the practices (*Court of Cassation, 29 November 2011, no. 10-27402*). In the same case, the Court of Appeal of Paris then considered that the deceptive practices were not established because there was no substantial modification of the consumer's economic behaviour as the consumer may compare an offer with other products in the comparison-shopping website (*Court of Appeal of Paris, 22 January 2013, no. 11/05403*).

In a similar set of facts, the Commercial Chamber of the Court of Cassation ruled that a comparison-shopping website, whose indexation system favours third party websites that pay for this service, must present itself as an advertising content provider and provide information on the priority of indexation of the referred offers, as the omission of such information could substantially alter the consumer's economic behaviour who is first led to products and offers of third party websites paying for priority of indexation and therefore cannot make a choice on the basis of objective criteria (*Court of Cassation, 4 December 2012, no. 11-27729*).

On 20 March 2019, in a different case involving the Google AdSense for Search (its online search advertising intermediation platform), the European Commission sentenced Google to pay a EUR1,49 billion penalty for abusive practices in online advertising. The company abused its market leadership by imposing a number of restrictive clauses in contracts with third-party websites which prevented Google's rivals from placing their search adverts on these websites. Google first imposed an exclusive supply obligation, which prevented competitors from placing any search adverts on the commercially most significant websites. Then, Google introduced what it called its "relaxed exclusivity " strategy aimed at reserving for its own search adverts the most valuable positions and at controlling competing adverts' performance. Therefore, the European Commission found out that Google's conduct harmed competition and consumers, and stifled innovation. Google's rivals were unable to grow and offer alternative online search advertising intermediation services to those of Google. As a result, owners of websites had limited options for monetising space on these websites and were forced to rely almost solely on Google.

Registered trade mark infringement

A person infringes a registered trade mark if they use or reproduce a trade mark for products or services identical to those listed in the registration. Trade mark infringement also exists if there is a likelihood of confusion in the mind of the public, through either:

- The use of an identical trade mark for products or services similar to those listed in the registration.
- The use of an imitated trade mark for products or services identical or similar to those listed in the registration.

(*Articles L713-2 and L713-3, French Intellectual Property Code.*)

The reproduction of a registered trade mark in a link may constitute trade mark infringement. Trade mark infringement is punishable, in particular, by three years' imprisonment and a fine of up to, depending on the type of infringement, EUR300,000 or EUR400,000 for natural persons (for example, the legal representative of a legal person) and five times this amount, that is up to EUR1.5 million or EUR2 million for legal persons (*Articles L716-9, L716-10* and *L716-11-2, French Intellectual Property Code; Articles 131-38* and *131-39, French Criminal Code*). It may also attract civil damages.

In the various cases involving the Google AdWords service, Google has been held liable by several French decisions on the basis of trade mark infringement, misleading advertising or civil liability.

On 1 February 2008, the Court of Appeal of Paris held that the use of trade marks by Google AdWords's keyword generator amounts to trade mark infringement. (*Court of Appeal of Paris, 1 February 2008, no. 06/13884*).

On 20 May 2008, the Court of Cassation asked three preliminary questions to the European Court of Justice (ECJ) judges, which are required to provide member states with a unique legal interpretation of trade mark owners' rights (*Court of Cassation, 20 May 2008, no. 05-14331, 06-15136* and *06-20230*).

On 11 February 2010, the Court of First Instance of Paris held that the use of the terms "Viton, Louis Viton, Wuiton, Witton, LouisViton, Vuton and Viuton" as keywords by the company eBay international AG to generate sponsored links pointing towards the website www.ebay.fr, without the prior approval of the

company Louis Vuitton Malletier (owner of the trade marks "Louis Vuitton"," Vuitton" and "LV"), constituted a trade mark infringement as well as a passing off (*Court of First Instance of Paris, 11 February 2010, no. 09/01480*).

In its decision of 23 March 2010, concerning Google AdWords, the ECJ held that:

> "the proprietor of a trade mark is entitled to prohibit an advertiser from advertising, on the basis of a keyword identical with that trade mark which that advertiser has, without the consent of the proprietor, selected in connection with an internet referencing service, goods or services identical with those for which that mark is registered, in the case where that advertisement does not enable an average internet user, or enables that user only with difficulty, to ascertain whether the goods or services referred to therein originate from the proprietor of the trade mark or an undertaking economically connected to it or, on the contrary, originate from a third party"

> "An internet referencing service provider which stores, as a keyword, a sign identical with a trade mark and organises the display of advertisements on the basis of that keyword does not use that sign" within the meaning of Directive 89/104 or Regulation 40/94"

> "the rule laid down [in Directive 2000/31/EC] applies to an internet referencing service provider in the case where that service provider has not played an active role of such a kind as to give it knowledge of, or control over, the data stored. If it has not played such a role, that service provider cannot be held liable for the data which it has stored at the request of an advertiser, unless, having obtained knowledge of the unlawful nature of those data or of that advertiser's activities, it failed to act expeditiously to remove or to disable access to the data concerned"

In other words, according to the ECJ the advertiser may be liable for trade mark infringement but the internet referencing service provider such as Google which stores, as a key word, a sign identical to a trade mark and organises the display of ads on the basis of this key word, does not commit an act of trade mark infringement but may be held liable on other grounds if it had knowledge thereof (*ECJ, 23 March 2010 Google France SARL* and *Google Inc. v. Louis Vuitton Malletier SA C-236/08 ; Google France SARL v. Viaticum SA and Luteciel SARL C-237/08 ; Google France SA v. Centre national de recherche en relations humaines SARL and others C-238/08*).

On 13 July 2010, the Court of Cassation, following the interpretation given by the ECJ, held that a search engine does not commit an act of infringement when it simply stores, as a key word, a sign identical to a trade mark and organises the display of ads (*Court of cassation, 13 July 2010, no. 08-13944*).

In 2012, the Court of Cassation held that, as regards the advertiser, there is no trade mark infringement where the sponsored link is triggered in a column that is separate from the natural results and the ad content does not make any explicit or implied reference to the trade mark. As regards Google, it held that, consequently, the offer of a referencing service allowing, on the basis of keywords, the display of commercial links to competing websites, is not wrongful (*Court of Cassation, 25 September 2012, no. 11-18110*).

In 2015, the Court of Cassation held that the insertion, as a shortcut, of a keyword referring the internet user to a results page displayed by the search engine, then its deletion, does not characterise an active role of the service provider likely to entrust him with the knowledge and control of the data stored by advertisers. The internet referencing service provider, who stores as a keyword a sign identical to a trade mark and organises the display of advertisements from it, does not use that sign within the meaning of Article 5(1) and (2) of Directive 89/104/EC (*Court of Cassation, 20 January 2015, no. 11-28.567*).

Copyright infringement

Linking may infringe the intellectual property rights of a website editor if the link copies material protected by copyright (*droit d'auteur*) from the linked website. Indeed, infringement of copyright consists of a reproduction, representation, dissemination, translation, adaptation or transformation that does not qualify as a legal exception of a literary, artistic or musical work without the author's consent.

The ECJ, in a decision dated 13 February 2014, held that "the provision on a website of clickable links to works freely available on another website does not constitute an act of communication to the public" within the meaning of Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (*ECJ, 13 February 2014, C-466/12, Svensson*), such that there is no infringement of the right of communication to the public.

In a decision dated 8 September 2016, the ECJ further held that "in order to establish whether the fact of posting, on a website, hyperlinks to protected works, which are freely available on another website without the consent of the copyright holder, constitutes a 'communication to the public' within the meaning of that provision, it is to be determined whether those links are provided without the pursuit of financial gain by a person who did not know or could not reasonably have known the illegal nature of the publication of

those works on that other website or whether, on the contrary, those links are provided for such as purpose, a situation in which that knowledge must be presumed" (*ECJ, 8 September 2016, C-160/15, GS Media*).

In a decision dated 26 April 2017, the ECJ has extended the GS Media solution and held that "The concept of 'communication to the public', within the meaning of [Article 3(1) of Directive 2001/29/EC] must be interpreted as covering the sale of a multimedia player, [...] on which there are pre-installed add-ons, available on the internet, containing hyperlinks to websites - that are freely accessible to the public - on which copyright-protected works have been made available to the public without the consent of the right holders" (*ECJ, 26 April 2017, C-527/15, Stichting Brein v. Jack Frederik Wullems)*.

The ECJ, in a decision dated 14 June 2017, held that the provision and management of an online sharing platform such as "Pirate Bay ", composed of BitTorrent files linking to protected works such as "Pirate Bay ", may constitute a 'communication to the public' (*ECJ, 14 June 2017, Case C-610/15, Stichting Brein v. Ziggo BV and XS4ALL Internet BV*).

Copyright infringement is punishable, in particular, by three years' imprisonment and a fine of up to EUR300,000 for natural persons (for example, the legal representative of a legal person) and five times this amount, that is up to EUR1.5 million for legal persons (*Articles L335-2 et seq., French Intellectual Property Code; Articles 131-38 and 131-39, French Criminal Code*). It may also attract civil damages.

Database right infringement

Linking may infringe *sui generis* rights in databases if the link allows extraction and/or re-utilisation of a qualitatively or quantitatively substantial part of a protected database, or allows the repeated and systematic extraction and/or re-utilisation of a non-substantial part of a protected database where such operations clearly exceed normal conditions of use of such database.

In 2009, the Court of First Instance of Paris held that the commercialisation of software whose purpose is to extract information from a company's online directory infringes the sui generis rights of that company in its database (*Court of First Instance of Paris, 3 November 2009, no. 09/13088*).

In 2013, the Court of Appeal of Paris held that a search engine did not undertake a substantial extraction from a real estate ads database and therefore did not infringe on the investment made to constitute the database by automatically indexing those ads (*Court of Appeal of Paris, 7 June 2013, no. 12/05061*).

Database right infringement is punishable, in particular, by three years' imprisonment and a fine of up to EUR300,000 for natural persons (for example, the legal representative of a legal person) and five times this amount that is up to EUR1,500,000 for legal persons (*Articles L335-2 et seq., French Intellectual Property Code; Articles 131-38 and 131-39, French Criminal Code*). It may also attract civil damages.

Breach of contract

Breach of contract can be claimed if the terms and conditions of the linked site contain an express prohibition on linking without the website owner's permission.

Other remedies

Unauthorised linking to a website may also create liability under rules governing comparative advertising, or under Article 9 of the French Civil Code and Article 8 of the European Convention on Human Rights protecting private life and image rights (*Court of First Instance of Nanterre, 6 September 2012, no. 11/13591; Court of First Instance of Nanterre, 13 September 2012, no. 11/12768*).

Framing

7. Which of the following legal remedies are or may be available in respect of unauthorised framing of content on another website:

- **Passing off;**
- **Unfair competition;**
- **Registered trade mark infringement;**
- **Copyright infringement;**
- **Database right infringement;**
- **Breach of contract; or**
- **Any others?**

Passing off

See *Passing off*.

Unfair competition

See *Unfair competition*.

In 2009, the Court of First Instance of Paris held that the framing of a travel agency's website on an online directory, together with the use of the travel agency's

domain name as well as the display of advertising for competing travel agencies, contributed to the diversion of internet user traffic and customers suffered by the travel agency and therefore constituted unfair competition (*Court of First Instance of Paris, 25 June 2009, no. 09/00823*).

Registered trade mark infringement

See *Registered trade mark infringement*.

In 2009, the Court of First Instance of Paris held that the framing of the website Voyanet.com by Pressvoyages.com, without the prior approval of the "Voyanet" trade mark holder, did not constitute trade mark infringement, as this word was not used as a mark to identify the origin of the services covered by that trade mark but merely as the address of the website Voyanet.com or to identify the entity that provides services on Voyanet.com (*Court of First Instance of Paris, 25 June 2009, no. 09/00823*).

Copyright infringement

See *Copyright infringement*. The reproduction or representation of copyright material (that is, protected by droit d'auteur) of a third party website through framing may constitute infringement of the economic rights of the author and even of their moral right (they may invoke, for instance, a misrepresentation of their work).

In 2009, the Court of First Instance of Paris held that the framing of the website Voyanet.com by Pressvoyages.com, without the prior approval of the copyright holder of the website Voyanet.com, constituted copyright infringement (*Court of First Instance of Paris, 25 June 2009, no. 09/00823*).

In three decisions dated 12 July 2012, the First Civil Chamber of the Court of Cassation put an end to the obligation established by case law under which website hosts must ensure that, after a first LCEN notification of the copyright holder and the withdrawal of infringing content, such content should not be published again. As a result, each time infringing content is published by a third party on a website host's site, a new notification is required by the copyright holder. Without such notification the website host will not be held liable (*Court of Cassation, 12 July 2012 no. 11-15.165, 11-15.188, 11-13.666 and 11-13.669*).

The Court of Cassation held, on the basis of Article L336-2 of the French Intellectual Property Code which allows the copyright holder to ask the Court to order any appropriate measures necessary to remove or block access to an infringing content and 6 I.-8 of LCEN which provides for a similar remedy, that the costs of such measures shall be borne by the website hosting provider (*Court of Cassation, 6 July 2017, no. 16-17.217, 16-18.298 and 16-18.595*).

On 21 October 2014, the ECJ held that the sole fact that a protected work, which is freely available on a website, is inserted on another website through framing, does not constitute an act of communication to the public within the meaning of Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, as the work is not communicated to a new public (that is, a public that had not been taken into account by the copyright holder when they authorised the initial communication to the public) nor communicated through new technical means that differ from the initial communication (*ECJ, 21 October 2014, C-348/13, BestWater*). Therefore, framing cannot constitute copyright infringement per se.

In 2016, the Court of Appeal of Paris specified that the *Svensson* and *BestWater* cases apply to copyright only but not to related rights such as the rights of audiovisual communication companies, such that these companies have the exclusive right to authorise the online communication to the public, including through framing (*Court of Appeal of Paris, 2 February 2016, no. 14/20444, France Télévisions v. Playmédia*). The case has been sent to the Court of Cassation (*Court of Cassation, 5 July 2017, no. 16-13092*), which stayed the proceedings until the ECJ renders a decision in related administrative proceedings brought by *France* Télévisions before the French Council of State (*Council of State, 10 May 2017, no. 391519*).

Database right infringement

See *Database right infringement*.

Breach of contract

See *Breach of contract*.

Other remedies

See *Other remedies*.

Metatags

8. Which of the following remedies are or may be available in respect of the unauthorised use of another party's registered or unregistered trade mark or other material in metatags or the hidden text of a website:

- **Passing off;**
- **Unfair competition;**
- **Registered trade mark infringement;**
- **Copyright infringement; or**

• Any others? (Please indicate whether the position will be different if a registered or unregistered trade mark is used in this way for a legitimate purpose rather than for the sole purpose of increasing traffic flow to the website owner's site.)

Passing off

See *Passing off*.

In 2005, the Court of Appeal of Paris held that the copying of the keywords and metatags of a competitor's website into the source code of another website, in the same order and with the same spelling mistakes, whereas such keywords are not necessary to describe the website's activity, constitutes passing off and unfair competition (*Court of Appeal of Paris, 12 January 2005, no. 03/14152, Kaligona v. Dreamnex*).

In 2007, the Court of First Instance of Strasbourg held that the use of the trade mark "Tryba" by a competitor as a key word in Google AdWords amounts to a passing off and unfair competition, even though it does not amount to a trade mark infringement in this case (*Court of First Instance of Strasbourg, 20 July 2007, no. 05/03979*).

Unfair competition

See *Unfair competition*.

In 2016, the Court of First Instance of Paris held that the use of a competitor's "Sapia" trade mark in the source code of a website does not constitute trade mark infringement as this word was not used as a mark to identify the origin of the services covered by that trade mark because it was invisible to internet users, but constitutes unfair competition (*Court of First Instance of Paris, 26 February 2016, no. 14/05994*).

The Court of Appeal of Paris ruled, that the use of a competitor's trade mark as a metatag constitutes trade mark infringement and unfair competition (*Court of Appeal of Paris, 13 June 2017, no. 16/07065, see Registered trade mark infringement below*).

Registered trade mark infringement

See *Registered trade mark infringement*.

In 2001, in the Distrimart case it was held that a metatag using the plaintiff's trade mark constitutes trade mark infringement on the grounds that this use created a likelihood of confusion (*Court of Appeal of Paris, 14 March 2001, no. 2001/137280*).

However, in 2004, the Court of First Instance of Paris held that a metatag using the plaintiff's trade mark did not constitute an act of trade mark infringement, as the reproduced trade mark was not used to designate products or services identical or similar to those listed in the trade mark registration but merely to designate the plaintiff, and such use could not create any risk of confusion (*Court of First Instance of Paris, 30 January 2004, no. 02/09302*).

In 2010, the Court of First Instance of Paris held that, since metatags are invisible to Internet users, the use of a trade mark as a metatag does not constitute trade mark infringement (*Court of First Instance of Paris, 29 October 2010, no. 09/12479*).

However, in 2014, the Court of Appeal of Paris held that the reproduction of a competitor's trade mark under the form of a metatag into the source code of a website constitutes trade mark infringement (*Court of Appeal of Paris, 19 March 2014, no. 12/18656*). In 2016, the Court of First Instance of Paris held a different position (*Court of First Instance of Paris, 26 February 2016, no. 14/05994, see Unfair competition above*).

In 2017, the Court of First Instance of Lyon ruled that while the use of a sign as a metatag which is invisible to the internet user cannot constitute trade mark infringement, as it cannot be perceived by consumers, there is trade mark infringement where the sign is used in such a way as to appear among search results (whose headings are aimed at influencing consumers' economic behaviour) that are visible to consumers (*Court of First Instance of Lyon, 17 January 2017, Julia Press c. Decathlon*). In that case, not only the trade mark "Inuka" was used by Decathlon as a metatag for its website decathlon.fr, but the heading of the search result leading to decathlon.fr was reading "Inuka on decathlon.fr", suggesting Decathlon was a distributor of Inuka products.

Recently, in a case between two pharmaceutical companies named respectively Merck & Co and Merck KGaA, the Court of Appeal of Paris ruled that the use of the "Merck" trade mark by Merck & Co as a metatag constitutes trade mark infringement and unfair competition. Merck & Co uses the corporate name "MSD France" to operate its business in France as the "Merck" trade mark is owned by the company Merck KGaA. However, Merck & Co used the "Merck" trade mark as a metatag on its French website www.msd-france.com. In this specific case, the judges considered that an internet user cannot suspect that there are two independent pharmaceutical laboratories called Merck and that there is a risk of confusion between the products made available by the company MSD France (that is, Merck & Co) on the internet and those sold by Merck KGaA. (*Court of Appeal of Paris, 13 June 2017, no. 149/2017*)

Copyright infringement

See *Copyright infringement*.

Copyright infringement may occur if metatags make unauthorised use of any creation protected by copyright (*droit d'auteur*) or if the website owner includes metatags in its website, which are protected by copyright, without having the authorisation

to modify the website from the web designer (*Commercial Court of Paris, 18 June 2003, no. 2002057573*). However, in this case, the Court of Appeal of Paris considered that the content of the website was not original and therefore may not be protected by copyright (*Court of Appeal of Paris, 12 January 2005, no. 03/14152, Kaligona v. Dreamnex*).

Other remedies

See *Other remedies*.

If a website includes metatags using a competitor's registered corporate name there may be usurpation of registered corporate name, passing off and unfair competition (*Court of Appeal of Paris, 13 March 2002, no. 01/18567*). However, the Court of First Instance of Paris held on 14 March 2008 that the use of the registered corporate name "Citadines" by a competitor did not constitute an act of unfair competition. However, it has been considered to constitute trade mark infringement (*Court of First Instance of Paris, 14 March 2008, no. 06/03212*).

Another type of action may lie in, for example, violation of a person's right over their personal data. However, in 2014, the Court of Cassation held that the reproduction of a person's name in the source code of a website does not constitute an act of infringement of that person's right to privacy and personal data, to the extent that it is not associated to any other personal data, and may become so only if the page to which the metatag is associated contains objectionable content (*Court of Cassation, 10 September 2014, no. 13-12464*).

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