



Online Platforms: Changes as from 28 May 2022

8 June 2022

Since 28 May 2022, newly identified misleading commercial practices resulting from Ordinance No. 2021-1734 of 22 December 2021 transposing European Directive 2019/2161 of 27 November 2019, (also known as the "Omnibus Directive"), have been added to the list of misleading commercial practices provided in the French Consumer Code.

In line with the Regulation of 20 June 2019, entitled the "Platform to Business" Regulation and through the adoption of the Omnibus Directive, the European legislator has strengthened the requirements of transparency and fairness in relations between online platforms and their consumers. This regulation places new information obligations on all online platform operators and sets out specific misleading commercial practices in this marketplace.

As a precursor, French law had already taken up the issue in 2015 by imposing a number of information obligations on online platforms as codified in Articles L.111-7 et seq. of the French Consumer Code.

No amendments to the French Consumer Code have been made regarding this earlier position.

New definitions have been made on the concept of « the online marketplace »

The French Consumer Code has added new definitions of what constitutes an online marketplace. The introductory article of this Code defines:

- An online marketplace as that "[...] of a service using software, be this a website, a part of a website or an application, which is operated by a professional or operated by another party on his behalf, and which enables consumers to conclude transactions at a distance with other professionals or consumers";
- An online marketplace operator as "[...] any professional who provides consumers with access to an online marketplace within the meaning of Article L. 111-7, point 2 of the first paragraph".

The latest definition of "online marketplace" has been added to the introductory French definition of "online platform" under Article L.111-7 I of the Consumer Code. Under the new terms of this article, an online platform operator is now defined as "any natural or legal person offering an online communication service to the general public on a professional basis, be it remunerated or not, and based on :

1° The classification or referencing by means of computer algorithms, the content, goods or services offered or put online by third parties;

2° Or the establishment of a connection between two or more parties for the purpose of selling a good, providing a service or the exchanging or sharing of a content, good or service.

As such, 1° of Article L.111-7 I of the French Consumer Code covers the entire scope of all online platform operators be they online marketplaces, online comparators or search engines, whilst the Omnibus Directive covers only online marketplaces. This thereby widens the application scope of both the new information obligations and the appreciation of potentially misleading commercial practices which until now were limited only to the online marketplaces covered by 2° of Article L.111-7 I of the Consumer Code.

New commercial practices that are now misleading by omission

The established list of information which is considered as of a "substantial" nature under Article L. 121-3 of the French Consumer Code has been added to. Henceforth, any commercial practice that omits, conceals or presents in an ambiguous, unintelligible or untimely way substantial information relating to:

- The professional or non-professional capacity and quality of individuals placing offers on an online marketplace;
- The main factors used for the classification of the offer placed and the rankings;
- The possibility to know whether and how the professional ensures that any opinions published concerning the offer on the marketplace do in fact come from consumers who have actually used or purchased the offer.

While all players, including search engines and online comparators are bound by the new information obligations of Articles L.111-7 et seq. of the French Consumer Code, the new commercial practices which are misleading by omission of information relating to the professional capacity or not of individuals placing an offer, only concern online marketplaces .



New commercial practices deemed misleading in all circumstances

Article L.121-4 of the French Consumer Code now includes four new commercial practices which are deemed to be misleading in all circumstances. Three of these practices are applicable to online platforms and consist in their act and nature of:

- Providing results in response to a consumer's online search without clearly informing the consumer of payments made specifically by a third party in order to obtain a higher ranking for one or more of the products or services appearing in the search results;
- Claiming that the reviews are posted by consumers who have actually used or purchased the product or service without taking the necessary steps to verify the reality of this;
- Publishing or having published by another legal or natural person any false consumer reviews or recommendations or modifying consumer reviews or recommendations in order to promote products or services.

It should be noted that unlike commercial practices that are misleading by omission, the abovementioned practices can be qualified as misleading without the need to establish that the economic behavior of the consumer has in fact been substantially altered.

The question of the cumulation of penalties

These new misleading commercial practices are reflected by certain information obligations set out in Articles L.111-7 II and L.111-7-2 of the French Consumer Code.

Thus, failure by an online marketplace to comply with the information obligation relating to the quality of the

advertiser under Article L.111-7 II 3° of the Consumer Code, may find itself not only to be sanctioned by an administrative fine¹, but equally to be punishable under criminal law² for undertaking misleading commercial practices by omission under Article L.121-3 6° of the French Consumer Code.

In 2014, the French Constitutional Council had the opportunity to admit the cumulation of an administrative penalty and a criminal penalty, stipulating that the principle of *ne bis in idem* was not applicable if "the total amount of penalties applied does not exceed the highest amount of any one of the penalties incurred"³. However, this decision which was based on the former Article L.141-1-2 VI of the French Consumer Code, provided for a ceiling on penalties in the event of a combination of administrative and criminal fines. This provision was recodified in Article L.522-7 of the French Consumer Code and then amended resulting in the removal of the capping condition. To date, the question of the cumulation of administrative and criminal penalties has therefore not been resolved.

In consequence, online platforms are now exposed to a higher risk of sanctions. Until this issue of cumulative sanctions is resolved, online platforms will have to increase their vigilance with regard to the compliance of their practices.

¹ Article L.131-4 of the French Consumer Code: where an administrative fine does not exceed 75,000 euros for an individual and 375,000 euros for a legal entity.

² Articles L.132-2 et seq. of the French Consumer Code: incurring a penalty of two years' imprisonment and a fine of 300,000 euros.

³ Cons. const., 13 March 2014, n° 2014-690 DC

Contacts



Sahra Hagani
Partner, Attorney-at-Law
E : shagani@avocats-gt.com
T : +33 1 41 16 27 16



Pauline Garcia
Manager, Attorney-at-Law
E : pgarcia@avocats-gt.com
T : +33 1 41 16 27 45