

## FOCUS IP

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### INFLUENCERS - ANALYSIS OF THE FRENCH REGULATIONS AND THE RECENT BILL OF LAW AIMING TO FRAME THEIR ACTIVITY



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In France, the number of influencers is estimated at more than 150,000. A study conducted in January 2023 by the DGCCRF on around sixty influencers revealed that 60% of them do not comply with the current regulations<sup>12</sup>.

Some initiatives have already emerged to improve practices. For example, in 2019, the OECD published a [Good Practice Guide on Online Advertising](#). The ICC also offers a [Communication Code on Advertising and Marketing](#). In France, the ARPP (the French Authority for the Regulation of Professional Advertising) has published ethical recommendations regarding best practices for transparency and loyalty applicable to influencer marketing.<sup>13</sup>

Given the multiplicity of violations of the regulations that are already applicable to influencers **(1.)**, several bills aiming to specifically regulate this activity have emerged. The most advanced to date is the one "aimed at combating the abuses of influencers on social media" **(2.)**.

#### 1. Regulation already applicable to influencers

To date, the only law regulating the activity of influencers is the law n° 2020-1266 of October 19<sup>th</sup>, 2020<sup>14</sup>, intended exclusively to protect minors.

In the absence of specific texts, this regulation applies to influencers, especially those relating to advertising law, consumer law and criminal law. Several influencers have already been sanctioned in this regard (see Appendix).

In particular, the following obligations apply:

- **Identification of the partnership by the influencer**

Since 2008, Article 20 of the LCEN (the French Law for trust in the digital economy) provides for the obligation for "any advertisement accessible (...) by an online public communication service" to clearly identify the person on whose behalf it is made. In practice, this is reflected, for example, by the mention "in partnership

<sup>12</sup> DGCCRF press release n°525 of January 23<sup>rd</sup>, 2023.

<sup>13</sup> Recommendation on digital advertising communication, effective January 1<sup>st</sup>, 2022

<sup>14</sup> Law n°2020-1266 of 19 October 2020 aimed at regulating commercial exploitation of the image of children under the age of sixteen on online platforms (1)

with..." or "sponsored by..." on the influencer's publications.

- **The prohibition of deceptive commercial practices**

An influencer promoting a defective product or a fraudulent website can also be punished on the ground of unfair or deceptive commercial practice<sup>15</sup>.

In this respect, Nabilla, an influencer, was recently sentenced by the DGCCRF (The French Directorate-General for Competition Policy, Consumer Affairs and Fraud Control) to pay a settlement fine of €20,000 for deceptive commercial practices on social media related to the promotion on the social media Snapchat of an online trading training site (see Appendix).

- **Provisions of the Evin law**

The French Evin law regulates the advertising of alcoholic beverages and applies to posts made via an online network.

For instance, Meta Group was recently forced by the Paris Court of Justice to remove 37 publications of influencers on Instagram that reproduced alcoholic beverages in an illegal way and to communicate the data of the owners' account in order to identify them.<sup>16</sup>

- **Regulations on the advertising of gambling, games of chance and sports betting**

Any commercial communication in favor of a gambling operator must respect a certain number of strict rules, including the reproduction of a warning message against excessive or pathological gambling.

Any publication aimed at minors is also prohibited.

## **2. The development of a specific legal framework for influencers**

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<sup>15</sup> See Art. L121-2.3° of the Consumer Code

<sup>16</sup> Judicial Court of Paris, January 5<sup>th</sup>, 2023, Case Addiction France / META

<sup>17</sup> Article 1 from the bill n° 1006 aimed at combating scams and abuses by influencers on social networks

Several bills aimed at regulating the activity of influencers on social media have already been tabled in the National Assembly, including in particular the bill of 15 November 2022 "*aimed at framing commercial and advertising practices linked to the market of influence on the Internet*", the bill "*aimed at reinforcing prevention against illicit commercial practices linked to the market of influence on the Internet and reinforcing the fight against these practices*" of 15 December 2022, and the bill of 27 December 2022 "*aimed at combating the abuses of influencers on the social networks*".

The latest proposal is the one registered before the National Assembly on 22 March 2023, "*aimed at fighting against scams and abuses by influencers on social networks*". It is currently undergoing its first reading in the Assembly under the accelerated procedure.

This text introduces several new provisions directly targeting influencers:

- **A legal definition of an influencer**

The proposal defines an influencer as follows: "*Natural or legal persons who use their reputation to communicate content to the public by electronic means with a view to promoting, directly or indirectly, goods, services or any cause whatsoever in return for an economic benefit or an advantage in kind the value of which exceeds the thresholds set by decree*"<sup>17</sup>.

This is based on the definitions already suggested by the ARPP<sup>18</sup> as well as the one referred to the Court of Appeal of Paris in a decision of February 10<sup>th</sup>, 2021<sup>19</sup>.

- **The obligation to have a legal representative within the European Union for influencers targeting French consumers**

The text would require influencers established outside the European Union and targeting French consumers

<sup>18</sup> ARPP: "*an individual expressing a point of view or giving advice, in a specific field and according to a style or treatment of his or her own, to an identified audience*".

<sup>19</sup> Paris Court of Appeal, Pôle 5, ch. 15, Feb. 10<sup>th</sup> 2021 - n°19/17548: "*A person active on social media, who by virtue of his or her status, position or media exposure could be a relay of opinion influencing consumer habits with a marketing aim*."

to appoint a legal representative (natural or legal person) located in an EU Member State, which would have to subscribe to a civil insurance to cover its activities.

The legal representative would then be subject to French law and anyone using the influencer's services would have to contract with its legal representative.

- **Regulation of the activity of an influencer agent**

The Bill defines an influencer agent as one who *"for compensation, represents or connects influencers with persons seeking their services to promote goods, services, practices or causes of any kind"*.

It can also offer influencers *"assistance and advice"* and must take *"all measures to ensure the defence of their interests and to avoid situations of conflict of interest"*.

The Bill also mentions the stipulations that must be specified in the contracts concluded between an influencer and his agency, including the nature of the diligences, the modalities of the payment and the respective rights and obligations of the parties.

- **The indication of the promotional nature of the offer**

Any promotion of products/services by an influencer must be explicitly indicated by a clear, legible and identifiable statement on the image or video during the entire promotion.

This could for example be a visible banner on the image.

The words "Sponsored" or "In partnership" would be therefore no longer be sufficient.

The edited images must also be marked with the words: "Edited images", visible in all formats, on the modified content, photo or video, and this during the entire viewing period.

Such obligation already exists for edited commercial photographs of models<sup>20</sup>.

Violation of these provisions shall be punishable by one year's imprisonment and a fine of €4.500.

In addition, if the influencer is only an intermediary in the sale, he/she has to:

- inform the potential buyer of the identity of the supplier;
- check the availability of the good; and
- check that it is not a infringing product;
- check for the existence of a certificate of conformity to European standards.

This is intended to provide a better framework for the practice of "dropshipping", in which the seller is only responsible for marketing, while the supplier is responsible for manufacturing and shipping.

- **The ban on promotion for certain products and services**

The promotion of certain products/services will be prohibited altogether. None of the following products shall be offered by an influencer:

- **In health sector:** this includes the prescription, supply, sale, performance or consumption of aesthetic acts, procedures, techniques, and methods reserved for health professionals, as well as surgical interventions, including those without therapeutic or reconstructive purposes.

The previous version of the Bill provided for a much broader express prohibition as pharmaceutical products were also excluded, such as drugs, contraceptives or foodstuffs intended for medical purposes.

A derogation was also provided in the previous Bill for Government health campaigns, but this is no longer the case.

- **In financial sector:** the proposal is based on the current wording of Article L. 222-16-1 of the Consumer Code, which prohibits direct or indirect advertising by electronic means.

This includes :

- some of the riskier financial contracts;

<sup>20</sup> Article L2133-2 of the Public Health Code

- the provision of certain services on digital assets;
- public offerings of tokens;
- investments or placements involving risks of loss to the consumer in a digital asset or, more generally, in a fungible or non-fungible intangible asset. This includes offers of crypto passbooks and non-fungible tokens (NFTs).
- **Illicit and infringing products:** only trademark infringements are covered and not patent, copyright or design infringements, which may seem surprising and should probably be modified during the examination of the Bill by the National Assembly<sup>21</sup>.

Violation of these provisions should be punished with a two years' imprisonment and a fine of €30.000, to which may be added a ban on exercising the activity of influencer.

- **Framework for the promotion of some products and services**

- **The promotion of vocational training** would only be allowed if are specified the nature of the funding of such training, the associated commitments and eligibility rules.

The name of the provider responsible for the training and the provider referenced on the dematerialised service mentioned in Article L.6323-9 of the Labour Code must also be mentioned.

- **Gambling<sup>22</sup> and video games that can be assimilated to gambling**, must indicate by a visible banner on the image or video during the entire promotion, that these games are reserved for adults and comply with the laws and regulations applicable to these games of gambling.
- **The promotion of sweet beverages or beverages with added salt or artificial sweeteners or manufactured food products** must include health information, the content of which will be specified by a decree.

The penalties for non-compliance with these provisions should be one year of imprisonment and a fine of €4.500.

- **The introduction of a label "Ethical Influencer"**

Such label could be delivered to any legal entity contributing, as part of its activities, to the prevention of scams and abuses by influencers.

A decree will have to specify the terms and conditions of this new label.

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The bill is currently being debated in the National Assembly and will then be examine in the Senate.

Several changes are therefore still likely to occur.

*With the assistance of Isaure de Morel*

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<sup>21</sup> Art. 2.B. of the bill: "Illicit and counterfeit products defined in Articles L. 716-9 to L. 716-11 of the Code of Intellectual Property".

<sup>22</sup> As defined in Article L. 320-1 of the Internal Security Code and which fall more generally under Chapters II, IIb and IIc of Title II of Book III of the Internal Security Code

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*Appendix – short summary of French judgments related to influencers*

INVOLVED INFLUENCER	CONTENT OF THE CASE	LEGAL SOLUTION
<b>Nabilla</b>	<p><u>Illegal advertising</u></p> <p>In stories on the social media, Nabilla Benattia-Vergara promoted a free bitcoin purchase service with the prospect of substantial gains, which the French Authority for the Regulation of Professional Advertising (DGCCRF) considered to be "misleading commercial practices", as the law requires that it be made clear that a content is the subject of a commercial partnership.</p>	<p>Settlement fine of €20,000 for misleading commercial practices, accepted by Ms Benattia Vergara in 2021, with the agreement of the Paris public prosecutor, following investigations carried out by the DGCCRF's national investigation department</p>
<b>Paul Antony (PA7)</b>	<p><u>Scam</u></p> <p>Encouraging subscribers to set up fake companies to receive state aid.</p>	<p>– 80,000 euros fine after being found guilty of fraud and money laundering in an organised group (July 2022, TJP).</p> <p>– Additional penalties: permanent ban on managing a company, ineligibility for five years and ban on leaving the country for the same period.</p>
<b>Bryan J. alias Bryan « les bons plans »</b>	<p><u>Selling fake car insurance certificates</u></p> <p>Offering fake car insurance certificates on Snapchat</p>	<p>Sentenced to 30 months of imprisonment and a fine of €30,000.</p>
<b>Cyprien</b>	<p><u>Disparagement</u></p> <p>In May, Sandra Szaja launched a new magazine <i>Lov my people</i> dedicated to people news, targeting youtubers and influencers. The front page of the first issue is dedicated to the youtubers Math Podcast and Andy Raconte.</p> <p>Influencer Cyprien wrote on Twitter: "What is this shit? We need to throw it quickly in the fire".</p> <p>Ms Sandra Szaja sued the influencer Cyprien, claiming that the failure of her magazine was due to the influencer's disparagement.</p>	<p>The Paris Court of Appeal (2021) found Cyprien and his company ADCI guilty of "disparagement" and ordered them to pay Ms Sandra Szaja's company €10,000 in damages plus €8,000 in legal costs.</p>
<b>Ms. Magali Berdah</b>	<p><u>Ongoing case</u></p> <p>Complaint by Elie Yaffa, concerning both deceptive commercial practices allegedly committed by Shauna Events and an organised scam. The rapper denounces a complex and organised scam system, centralised by the company Shauna Events, a system fuelled by the passivity of social media.</p>	<p>On September 6<sup>th</sup>, the courts opened an investigation for "misleading commercial practices" against Magali Berdah's influencer agency Shauna Events. However, the courts did not uphold the ground of scam in an organised group.</p> <p>This investigation was entrusted to the Antibes police station, the town in which Shauna Events is registered and which is under the jurisdiction of the Grasse Court.</p>

Source : National Assembly.