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**HOW EUROPEAN LAW IMPACTS EUROPEAN MARKETERS IN FRANCE**

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In last month's issue, our colleague Filip Winter addressed the question of "how European law impacts European marketers in the Czech Republic", thus providing a perspective on the subject from a country that recently joined the EU. This month, our comments will be focused on one of the countries that were among the founders of the EU , considering how marketing in France is affected by EU law.

In France, marketing and advertising practices were subject to specific regulations before the EU took steps to develop its own rules. In certain fields, such as data protection, the French system was used as a model in developing EU rules.

However, the fact that France often had pre-existing regulations has had its drawbacks. Once the EU rules were passed and required implementation into national law, France sometimes offered very low reactivity resulting in being among the last of EU members to comply with EU harmonization rules.

In practice, this can mean that foreign marketers have a low level of foreseeability of what rules must be complied with in France.

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## **1. A fairly low impact of EU law on European marketers in France**

In many fields, the French law-maker began setting rules long before the European Union did.

### 1.1. Restricted areas

Advertising for tobacco products is prohibited in France. This includes all kinds of direct and indirect advertising, as well as the distribution of premiums or gifts.

Advertising for alcoholic beverages, while it is not prohibited *per se*, is subject to strict limitations.

These rules were set forth in 1991, in the *Loi Evin*, and are so restrictive that EU law does not have any real impact on them.

### 1.2. Personal data

France was one of the first countries to develop a body of rules aiming at the protection of personal data in the computer environment.

A law was passed on January 6, 1978 and it set forth a comprehensive set of rules that remained effective through the generalization of information technologies and the boom of the Internet.

This law, which aimed at protecting the individuals whose data were collected and processed on computer systems, was widely used as an example to develop similar laws in other countries, as well as the directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

This could explain why France is often among the last countries implementing EU directives. In this case, while the 1995 directive should have been implemented by 1998, France only passed a law on August 6, 2004, eventually amending the 1978 law by transposing the 1995 directive.

### 1.3. Consumer protection

A similar phenomenon could be noted in the field of consumer protection. French law provides a system which offers a fairly high level of consumer protection. This is one of the reasons why the directive 97/7/EC of 20 May 1997 on the protection of consumers in respect of distance contracts was only implemented into French law through an *ordonnance* dated August 23, 2001.

In the same way, misleading advertising has been prohibited in France since the *loi Royer* of December 27, 1973. In order to ensure compliance with the directive 97/55/EC of October 6, 1997 amending the directive 84/450/EEC concerning misleading advertising so as to include comparative advertising, French law was only amended in 2001 through an *ordonnance* dated August 23 to adjust its rules on comparative advertising so as to have them comply with the EU directive.

As regards the more recent directive 2005/29/EC of May 11, 2005 concerning unfair business-to-consumer commercial practices in the internal market, two separate cases need to be considered. The directive provides a general prohibition of unfair practices, which includes (i) misleading commercial practices and (ii) aggressive commercial practices.

With respect to misleading practices, French law provides more restrictive rules than the directive and thus, little implementation should occur. This allows France to benefit from the extension of the implementation deadline from 2½ years to 6 years, which is offered to countries with a more restrictive body of rules. This will mean a further delay in EU harmonization and, as a consequence, longer uncertainties for the pan-European marketer.

However, the concept of aggressive commercial practices does not exist in France and the EU directive, once it is implemented, will have a direct impact on French law, as discussed below.

## **2. A more substantial impact of EU law on European marketers in France**

EU law can also bring into effect new legal concepts in France, which need to be implemented into national law. EU law also addresses new issues that have not always been addressed by French law, thus triggering the passing of new laws or the acceleration of a lengthy law-making process.

### **2.1. Aggressive business-to-consumer commercial practices**

The above-mentioned directive 2005/29/EC of May 11, 2005 concerning unfair business-to-consumer commercial practices in the internal market provides a prohibition of aggressive B to C practices. At this time, this concept does not exist in France and it will thus need to be inserted into French law. According to the directive :

*“a commercial practice shall be regarded as aggressive if, in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer’s freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise.”*

For instance, an ad directly inviting children to purchase or to convince their parents to purchase the products subject to the ad is deemed an aggressive practice. The directive provides an

exhaustive list of approximately 50 unfair commercial practices that are prohibited in all circumstances.

France will need to comply with the implementation deadline, set at 2½ years, as regards aggressive practices since this concept does not yet exist in France.

## 2.2. E-commerce

European law played a significant part in the evolution of French law regarding e-commerce. The fast expansion of the Internet and e-commerce initially meant that French courts had to apply pre-existing general rules that had been adopted long before e-commerce appeared in France. These general rules offered interesting but very uncertain solutions since case-law varied extensively.

A specific body of rules was needed and the French law-maker began working on such rules. However, a number of policy and government changes prevented these rules from being passed rapidly and the EU directive on e-commerce was voted in 2000, before any law was passed in France.

The French law-maker therefore had to take the new EU directive into account to develop its new law, which was finally passed on June 21, 2004, two and a half years after the deadline set by the directive. The June 21, 2004 law aims at developing trust in the digital environment and, by implementing the e-commerce directive, it should allow marketers in France to benefit from rules harmonized on a European level.

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On a more global level, it appears that the currently applicable EU rules in the field of marketing have been fairly well implemented into French law, whether they have brought real changes or not and whether the transposition was made within the deadlines or well after.

While this should lead pan-European marketers to believe that they can rely on a harmonized body of rules, they should remain careful since this does not mean that the exact same rules apply throughout Europe. Specific national legislation remains, often with more restrictive requirements, and EU directives often offer options leading to different laws.