



II-3.4: The French Advertisers' Self-Regulation Authority forbids two false advertisements

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Translated
Article



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MAIN INFORMATION

The Jury for Advertising Deontology ordered two of the government's advertisements on cattle breeding to be taken off the air, because they falsely claimed that cattle breeding was mostly a family-run business run in an environmentally-friendly way. The sanction illustrates the power of self-regulation.

CONTEXT AND SUMMARY

The government had paid for a series of ten advertisements that were intended to be broadcast on the radio in the countryside, entitled let's be strong. The goal of this campaign was to positively influence public opinion towards cattle breeders. One of these advertisements touted pig breeding, saying that the breeders are "artisans" and pig breeding in France is "mostly a family business." A second advertisement touted cow breeders, with a breeder stating that keeping cows in pasture helped France preserve its forests and contributed to carbon-rich soil. The advertising industry is regulated by its own professional association, the *Autorité de régulation professionnelle de la publicité* (ARPP - Professional Advertising Regulatory Authority), implemented in 2003 by the industry, and within which there are representatives of advertisers, broadcasters, and media.

In 2008, a Jury for Advertising Deontology was set up. This Jury is also a part of self-regulation (the State is absent) and is governed by its own set of rules. It functions collegially and is presided by an independent, qualified person, who is currently a member of the Council of State. This jury can be consulted over complaints, when a person believes that an advertisement violates advertising deontology. The jury then investigates the complaint, and then, if necessary, asks the ARPP to take measures to stop the advertisement. The Jury's rules make sure it is impartial.

In this case, the *Fondation Brigitte Bardot* complained to the ARPP about a number of this government campaign's advertisements. On November 29, 2010, the Foundation submitted a complaint to the Jury regarding the government's entire radio campaign. The foundation contested the truthfulness of the way French breeding was presented: it was cast as family-based agriculture, respectful of animals and the environment. Yet, this is untrue, because the system is mostly based on environmentally destructive industrial breeding.

The advertiser's defense was that the campaign, designed by professionals and the Ministry of Agriculture, only had 30 advertisements in it, and therefore could not express every nuance; but, as long as the information contained within the advertisements are objective and conform to laws and current practices, the advertisement does not violate deontological standards. The Jury agreed with the government regarding the advertisement concerning food for calves: calves feed is a milk-based product with poor nutritional value, but which is in conformity with European Union directives, which makes the message on calf feed irrefragable.

However, another advertisement states that pig breeding in France is a "family affair" and remains human-sized. The plaintiff pointed out that more than 90% of pig breeding in France is performed indoors, and the Jury agreed that the attempt at a flattering comparison between France and other countries, was not appropriate. Therefore, the jury ruled, "The advertisement does not fairly express the reality of the actions or product characteristics touted by the advertiser. No proof has been shown that pig breeding methods in France are not industrial. Therefore, it contravenes provisions 1/1 and 2/1 of the Recommendation on Sustainable Development."

The Jury was just as severe with the advertisement on cow breeding's impact on the environment.

Indeed, the advertisement states that cows produce methane, but that breeders maintain plots of land in order to breed them, and that by grazing, cows maintain pastures, thereby contributing to carbon-rich soil. The litigants argued before the Jury whether cow breeding had a direct or indirect impact on global warming, and on wasting grain and energy, each one producing scientific articles to back up their respective, and contradictory, arguments.

The Jury for Advertising Deontology concluded that the message should have been more nuanced, and that it leads listeners to believe that breeding is completely harmless for the environment, which is not yet the case. Because the message was delivered in “overly general terms” it also goes “against the recommendation on sustainable development, which is why the Jury requests the ARPP’s general director to take the necessary measures to stop both advertisements from being broadcast.”

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BRIEF COMMENTARY

Regulating content in media regulation is a very delicate question. As shown by the debates surrounding Internet regulation, freedom of speech, which is a constitutionally guaranteed right in all democratic countries, must be nuanced by public policy concerns. Most often, countries prioritize both principles: the United States radically promote freedom of speech, whereas European judges have the task of maintaining a balance between both principles. Therefore, European, Constitutional, and national judges define the limits between freedom of speech—necessary for public information, and one of the pillars of a democratic society—and public policy concerns, which justify certain censures.

The decision related above is interesting because it is part of a completely different system: self-regulation. Indeed, far from judges and laws, the Office for Advertising Control (Office de contrôle des Annonces) was established as an association including agencies, broadcasters, and media in 1935. In 1953, the Office became the Bureau de Vérification de la Publicité (BVP – Bureau for Advertising Verification), which remains a private institution that gives its opinion before any advertisement can be broadcast. This flexible approvals system can be compared to Regulatory Authorities’ characteristic *ex ante* intervention powers. In 2008, the BVP was transformed into the Autorité de Régulation Professionnelle de la Publicité (Professional Advertising Regulatory Authority), and following the current trend for all regulatory authorities, created a functional division with the creation of the Jury for Advertising Deontology, which looks very much like what Independent Administrative Authorities call Sanctions Commissions.

Indeed, this is soft law, since the ‘Jury’ (rather than Court or ‘sanctions commission’) uses ‘recommendations’ and does not decide upon sanctions, such as taking an advertisement off the air, itself. It simply asks the ARPP to “take the necessary measures to stop advertisements that do not follow recommendations from being broadcast.”

Of course, the press rapidly announced that the Jury itself had ordered the advertisements to be taken off the air. This leads one to think that if there were an appeal of the Jury’s decision, it would have to take place before the Council of State, because the ARPP’s General Director is only responsible for taking the necessary measures to take the advertisement off the air. This supposes that the Jury has already implicitly ordered the advertisement to be taken off the air, because it explicitly declared that the complaint filed with it concerning these advertisements was legitimate. Furthermore, the ARPP only issues recommendations: the February 23 ruling was based on the Sustainable Development recommendation.

This flexible system of recommendations is especially used in self-regulation, but the Council of State is careful to remind regulators that such recommendations are actually rules, and that when they are grievous, they can be subject to judicial review. The Council of State recently did just this in a case relating to the French Electricity Regulator’s recommendation concerning diffuse effacement.

Judicial review tempers the autonomy of self-regulated systems and is especially necessary in a case such as this, where the decision of this self-appointed Jury affects an advertising campaign

commissioned by the Government and relevant professionals. According to the traditional schema, it is astonishing to see a ministerial decision quashed by a decision made by a professional organization: it is the inversion of Kelsen's pyramid.