[FR] Surreptitious advertising: *Conseil d'Etat* reduces fine imposed by ARCOM on C8

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The provider of the C8 TV channel asked the *Conseil d'Etat* (Council of State) to annul the decision issued by the *Autorité de régulation de la communication audiovisuelle et numérique* (the French audiovisual regulator – ARCOM) on 21 June 2023 fining it EUR 120,000 for programmes broadcast in 2022 and EUR 80,000 for programmes broadcast in 2023 that had breached the ban on surreptitious advertising. Article 9 of the decree of 27 March 1992, issued in accordance with Articles 27 and 33 of the Law of 30 September 1986 laying down the general principles defining the obligations of service providers with regard to advertising, sponsorship and teleshopping, and transposing Directive 2010/13/EU of the European Parliament and of the Council, states that: "Surreptitious advertising is prohibited. For the purposes of this decree, surreptitious advertising constitutes the verbal or visual presentation of goods, services, the name, trademark or activities of a producer of goods or a provider of services in programmes for advertising purposes."

In its decision, the *Conseil d'Etat* pointed out that, under the above provisions, the mere appearance of a brand or product on screen in an audiovisual programme, even on several occasions, could not in itself be regarded as a breach of the ban on surreptitious advertising. This might not be the case, however, if the brand or the product on which it was based was the subject of part of the programme or given a prominent place in it, e.g. shown close up or very frequently, and was thus intentionally highlighted in such a way that the commercial objective was obvious.

The *Conseil d'Etat* began by analysing the legality of the sanction relating to the programmes "Le 6 à 7" and "Touche pas à mon poste" broadcast on 4, 9 and 17 November 2022. After reviewing the facts, it ruled that ARCOM, which had based its decision on (i) the duration and repetition of the appearance of the brands in question, (ii) the comments that had drawn viewers' attention to them, and (iii) their association with the presenter, who had been a central figure in the programmes concerned, had been entitled, in the light of the above principles, to consider that the facts mentioned in the contested decision infringed the ban on surreptitious advertising laid down in Article 9 of the decree of 27 March 1992. In addition, the *Conseil d'Etat* ruled that, given the seriousness and repetition of these infringements, the EUR 120 000 fine imposed by ARCOM was not

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disproportionate. C8 therefore had no grounds to seek the annulment of this decision.

With regard to the penalty for the broadcasts on 24 and 30 January 2023, the *Conseil d'Etat* drew a distinction between the broadcasts on 24 January, during which the brands had appeared over 100 times, and the "Touche pas à mon poste" programme broadcast on 30 January. With regard to the latter, ARCOM had found C8 guilty of broadcasting surreptitious advertising on the grounds that one of the guests had worn a sweatshirt bearing the logo of a cryptocurrency exchange platform, which had been visible during the final part of their appearance in the programme. According to the *Conseil d'Etat*, whose investigation had shown that the logo had been concealed for most of the programme and had only appeared occasionally on the edge of the picture during the final six minutes, ARCOM had made an error in its assessment of the facts.

As a result, C8 could not be held liable for violating the ban on surreptitious advertising in this case. The *Conseil d'Etat* therefore deemed it appropriate to reduce the EUR 80 000 fine imposed on C8 for the programmes broadcast in 2023. In view of the seriousness of the breaches during the broadcasts of 24 January 2023, it ruled that a fine of EUR 60 000 would be appropriate.

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https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2024-12-31/484422

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