



# **Foreign Law Brief: France: Adapting the French Legal Framework to Promote Electronic Commerce**

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# **FOREIGN LAW BRIEF**

**FRANCE: ADAPTING THE FRENCH LEGAL FRAMEWORK  
TO PROMOTE ELECTRONIC COMMERCE**

June 2000

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**ABSTRACT**

In 1998, Prime Minister Jospin launched the Government Program for the Information Society, which is designed to allow France to reduce the gap in the area of information technology. One of the Program's top priorities is electronic commerce. The government's objective is to create a secure environment for consumers and sellers that will foster the long term growth of electronic commerce. The government seeks to achieve its goal by ensuring consumer protection, recognizing the legal value of electronic signatures, and liberally implementing the recent laws and regulations concerning encryption methods and the confidentiality of data exchange.

## **I. Background and Analysis**

### **A. Introduction**

During his landmark speech of August 25, 1997, at Hourtin for the 18th Summer Forum on Communication, Prime Minister Jospin pledged to move France into the Internet era. Recognizing that France lagged far behind in the information technology field, the Prime Minister stated his absolute determination to see France make up for lost time. He announced that the government would shortly put into place an ambitious plan of action to encourage and to facilitate France's entrance into the information age and would begin the related process of adapting the French legislative framework. To that effect, the Prime Minister asked the *Conseil d'Etat* (France's highest administrative court) to prepare a report on the new legal issues raised by the development of the Internet, to set forth recommendations for the necessary adaptations of national law, and to emphasize areas that require international dialogue and cooperation. The government released its plan in January 1998, making the development of electronic commerce one of its top priorities. This release was followed by the publication in September 1998 of the *Conseil d'Etat's* report, which extensively addresses electronic commerce in its Part II.

Electronic commerce puts sellers in direct contact with end consumers in a way that is unprecedented, giving consumers access to a wide range of services worldwide. However, because it creates unfamiliar situations for consumers, some fear that their interests are at risk, and they are therefore unwilling to conclude on-line contracts. Although electronic commerce on the Internet is increasingly successful among French consumers, it has still not become a mainstream activity. The government's aim is to boost consumer confidence in this new form of exchange by: (1) providing a legal framework that offers a level of consumer protection comparable to that applicable in the European Union (EU) to distance selling carried out along traditional methods; and (2) ensuring the security and the confidentiality of transactions.

This Foreign Law Brief attempts to show how these objectives are being implemented. It provides an overview of the general provisions of consumer protection, based on both national and EU legislation. It then discusses the legal recognition of electronic signatures and the liberalization of cryptology, both considered as essential tools in ensuring the security and the confidentiality of electronic commercial transactions.

### **B. Relevant Legislation: Overview of Consumer Protection**

French consumer protection legislation has, by and large, a general nature, which is not specifically directed at one or the other sector or form of commercial activity. It is therefore in theory applicable to electronic commerce, but some uncertainty does exist about how current legislation can be applied to electronic commerce. A number of adjustments or clarifications of the law are necessary to eliminate ambiguities and to remain in step with EU and international law in this field.

#### **1. Legal Nature of Electronic Transactions**

Electronic transactions are governed by the law on distance contracts contained in the Consumer Code, starting with article L.121-16 and following articles, and in a regulation dated December 3, 1987. Distance selling is defined as "any techniques allowing the consumer, outside of the places where clients are usually received, to order a product or a service." Telephone, video-transmission, and the use of the post office are among those considered as distance techniques.

This definition is similar to EU Directive 97/7/EC of May 20, 1997, On the Protection of Consumers in Respect to Distance Contracts. This Directive has yet to be transposed into national law. It identifies a distance contract as “any contract concerning goods or services made between a supplier and a consumer within the framework of a system of remote selling or a service provision organized by the supplier who for this contract uses exclusively one or more communication techniques until the distance closing of the actual contract.” “Remote communication technique” is defined as “any means which without the physical and simultaneous presence of the supplier and consumer may be used for closing a contract between parties.”

## 2. Advertising

Advertising is currently the primary source of income for many Internet sites. It enables them to pay their own way and to serve users free of charge. Thus, the *Conseil d'Etat* holds that an equitable balance must be found between the need for consumer protection and the interests of advertising professionals.

As opposed to some forms of advertising that are governed by specific regulations (for example, advertising on television), there is no specific regulation applicable to the Internet, or more specifically, to electronic commerce in France. In its report, the *Conseil d'Etat* states that recommending regulation for advertising specific to the Internet does not seem necessary, as certain general principles unquestionably apply. However, clarifications are necessary for special legislation concerning tobacco, alcohol and medication. The *Conseil* also emphasizes the need for self-regulation by advertising professionals, since practices in this area are constantly changing.

The general principles applicable concern notably a ban on misleading advertisements, the supervision of comparative advertising, and the transparency of advertising (e.g., revealing the identity of who has paid for an advertisement).

Article L.121-1 of the Consumer Code forbids any misleading advertising of whatever shape or form and makes it a criminal offense. The offense is committed once the advertising is either placed or received in France. As a result, a French judge will be competent to rule on the legality of an advertising message issued abroad when received in France.

Comparative advertising is allowed by French law under certain conditions: (1) if it is fair and truthful; (2) if it does not lead the consumer into error; and (3) if its main purpose is not to take advantage of the notoriety attached to a trademark. In addition, the comparison must be limited to the essential, representative, relevant and verifiable characteristics of similar products or services available on the market. As in the case of misleading advertising, the French judge is competent when the advertisement is received in France.

Lastly, consumers must be able to distinguish advertising messages from other kinds of messages. The obligation to identify advertising as such is provided for in article 43 of the Law N° 86-1067 of September 30, 1986, concerning audio-visual media, which applies to online services. This article states that “an advertising message broadcast by the services mentioned in the present articles must be presented as such.”

The principles listed above are also contained in EU legislation. Misleading advertisements are prohibited by article 2 of Directive 84/450/EEC of September 10, 1984, which gives the following broad definition “[a]ny advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which by reason of its deceptive nature, is likely to affect their economic behavior or which, for those reasons, injures or is likely to injure a competitor.”

Comparative advertisements are ruled by the directive on misleading advertising, which was amended to this effect in 1997 (Directive 97/55/EC). It authorizes comparative advertisements under conditions similar to the ones set forth in French law. This amendment has yet to be transposed into national law.

In addition, France will also have to transpose the Directive on Certain Legal Aspects of Electronic Commerce in the Internal Market adopted on May 15, 2000. It contains the following rules which apply specifically to online commercial communications:

- commercial communication must be clearly identifiable as such;
- the natural or legal person on whose behalf the commercial communication is made must be clearly identifiable;
- promotional offers, such as discounts, premiums and gifts, where authorized, must be clearly identifiable as such, and the eligibility and qualifying conditions for them must be easily accessible and be presented accurately and unequivocally;
- promotional competitions or games, where authorized, must be clearly identifiable as such, and the conditions for participation must be easily accessible and be presented accurately and unequivocally; and
- when unsolicited commercial electronic mail communications are received, they must be clearly and unequivocally identifiable as such as soon as received by the recipient.

### ***3. Sellers' Identity***

A consumer visiting a commercial site should be able to check up on the identity of the person or company responsible for the site prior to any transaction. In its 1997 report entitled "Electronic Commerce: Sales Offer and Consumer Protection," the French National Consumer Council recommended the adoption of minimum identification criteria, such as the name of the company, registered office address, and name of the legal representative. In addition, it recommended putting the information contained in the national business name register on the Internet. This recommendation was implemented, and the national business name register is now on-line and contains information on 2,700,000 companies.

At the EU level, the Directive of May 15, 2000, lists in article 5 the general information to be provided by sellers: name, address, particulars including an electronic-mail address, the trade register in which the seller is entered, registration number, authorization number--if one is requested for the seller activity--and VAT number if seller activity is subject to the VAT.

### ***4. Information to Be Provided Before the Conclusion of the Contract***

Pre-contractual information, as well as information on the contract itself, is crucial for the consumer to enable him to make informed decisions. French consumer law now in force provides a high level of protection on this point in the Consumer Code in articles L.111-1 through L. 114-1. Identification of the seller, information on product features, price and conditions of sale, availability of spare parts, delivery costs, the existence of a right of withdrawal, etc. are mandatory.

Directive 97/7 EC (cited above) is also highly detailed. It gives a complete review of the information that must be given to consumers and states that the said information must be fair: the commercial aim must appear unequivocally, and information must be given in a clear and understandable manner by any means adapted to the distance communication technique being used. Consumers must be provided with information on the seller's identity, the main characteristics of the goods or services offered, the price of the goods, including taxes, delivery cost when appropriate, the period for which the offer or the price remains valid,



information on the contract (contract formation, contractual rights and obligation, etc.).

In addition, the Proposal for a Directive on Certain Legal Aspects of Electronic Commerce addresses the formation of electronic contracts which is not covered by Directive 97/7. It calls for the seller to describe in advance what steps are necessary before the formal conclusion of a contract, to state whether or not the concluded contract will be filed, and whether it will be accessible, and to list the expedients for correcting handing errors.

### **5. Information for the Consumers in Their Own Language**

Law N° 94-665 of August 4, 1994, regarding the use of the French language, imposes the use of French “in the designation, offer, presentations, directions for use and the description of the scope and conditions of warranties for a product or service, as well as on the invoices and receipts” (art. 2). The combined use of one or more foreign languages is authorized, but in this case, article 4 of the Law states that the French version be as readable, audible and intelligible as the presentation in the foreign language. Failure to respect these provisions is punishable by class four fines. In theory, these provisions are applicable to the Internet. Given the transnational nature of the Internet, their application would lead to systematic breaches of the law by foreign sites accessible in France, the great majority of which are in English. Therefore, the *Conseil d’Etat* recommends adopting a more realistic approach and clarifying the scope of the Law. In addition, several complaints regarding this Law are presently pending before the European Commission. The obligation concerning the use of a language is seen as encroaching the principle of the free movement of products and the unrestricted supply of services. Directive 97/7 refers the question to the competence of EU Member States.

### **6. Consumer Consent and Right of Withdrawal**

It is highly desirable to make certain that a consumer’s final consent to the terms of the contract is clearly given. The *Conseil d’Etat* recommends that the acceptance process for a sale offer comprise separate stages to ensure that the consumer has given his full and informed consent. It suggests that the final show of consent be in the form of either a confirmation by e-mail with the obligation to store the message or by an action requiring at least two separate clicks on two separate buttons.

The Proposal for a Directive on Certain Legal Aspects of Electronic Commerce also emphasizes the importance of the quality of the act of consent. It stipulates that when a recipient in accepting a service provider’s offer is required to give his consent through technological means, such as clicking on an icon, the contract is concluded when the recipient of the service has:

- electronically received from the service provider an acknowledgment of receipt of the recipient’s acceptance, and
- confirmed having received the acknowledgment of the receipt.

Equally important is the existence of a clear grace period during which a consumer may change his mind or withdraw from a purchase agreement or contract. Pursuant to article L. 121-26 of the Consumer Code, the buyer of a product has seven full days from delivery of his or her order to return the product to the vendor for an exchange or refund without a penalty, except for the cost of returning the product. The Directive 97/7 has a broader scope that includes services. It provides that for any distance contract, the consumer has a period of at least seven working days in which to withdraw from the contract without any penalty and without giving any reason. The only charge is the direct cost of returning the goods. Any sums paid in advance by the consumer must be reimbursed fully, as soon as possible, and in any case within 30 days.

Exercising this right, however, should not lead to a consumer being able to enjoy a service without paying for it. The directive provides that unless agreed otherwise by both parties, the right of withdrawal cannot be exercised in certain cases. It mentions contracts for providing services whose execution starts before of the 7-day period, the supply of audio or video recordings or computer software unsealed by the consumer, and the supply of newspaper, reviews or magazines.

### **7. Law Applicable to the Electronic Contracts**

This issue is governed by the 1980 Rome Convention on the law applicable to contractual obligations. It covers all types of contracts, whether for goods or services. The Rome Convention was signed by the majority of EU Member States and was ratified by France on April 1, 1991. France has also ratified the 1955 Hague Convention on the International Sales of Movable Objects and the 1980 Vienna Convention on the International Sale of Goods. However, the *Conseil d'Etat* and other commentators have found that these two conventions are not suited to electronic commerce.

The basic principle of the Rome Convention is that parties have the freedom to choose the law that will govern a contract between them. In the absence of such a choice, the contract will be governed by the law of the country with which it is more closely connected. It is presumed that the contract is most closely connected with the country where the party who is to effect the performance of the contract has his habitual residence at the time of the conclusion of the contract. Thus, in practice, the vendor or service provider will be favored by the Convention to the detriment of the consumer.

The Rome Convention contains provisions in Article 5 that protect consumers, but the *Conseil d'Etat* holds that they are written in a manner not easily applicable to electronic commerce. It has therefore recommended the drafting of a new international agreement that would not systematically favor the vendor in the absence of the choice of law. The *Conseil* suggests, for example, that the law applied should be that of the consumer's country of residence when the consumer was solicited by the vendor before the transaction. If the consumer was not solicited, the law of the vendor's country of residence should apply.

### **8. Protection of Personal Data**

The knowledge of consumer behavior is a tremendous marketing tool for merchants, enabling them to target more precisely their products or services and even to anticipate the needs of consumers. Internet technologies have made the collection and processing of personal data infinitely easier. However, the information is usually collected without the knowledge of consumers, and thus its misuse could dangerously compromise the right to privacy.

Realizing the risk that electronic data processing would create with respect to personal data and to the freedom of the individual, France adopted Law N° 78-17 of January 6, 1978, on "Data Processing and Liberties."

The Law applies in the event of "an occurrence of data processing" made in France. Techniques and practices aimed at tracing consumer behavior definitively fall under its scope. For example, the creation of clandestine databases is punishable by a fine of 300,000 *francs* and a three-year prison term, while collecting personal data without the knowledge of the individual is punishable by a fine of 10,000 *francs*.

In addition, two EU Directives came into force on October 25, 1998: Directive 95/46/EC, concerning the protection of private individuals with respect to personal data and the free circulation of information, and Directive 97/66/EC concerning the processing of personal data and the protection of privacy in the telecommunication sector. The Ministry of Justice has prepared a bill to incorporate Directive 95/46 into national law, while the provisions of Directive 97/66 will be incorporated into national law through regulatory

measures, except for certain provisions requiring a law presently being drafted.

## **II. Security and Confidentiality of Transactions**

Long term development of electronic commerce necessarily involves the creation of a secure environment for buyers and sellers. Legal recognition of electronic signatures together with the setting up of certification-service providers and the use of cryptology are viewed as essential in ensuring the security and confidentiality of on-line transactions.

### **A. Recognition of the Legal Force of Electronic Documents and Signatures**

A signature fulfills a double role: it identifies the signatory and manifests his or her consent to the content of the document. Electronic transactions exclude handwritten signatures, which are replaced by electronic signatures. A definition of an electronic signature can be found in Directive 99/93/EC on a common framework for electronic signatures. It defines “electronic signature” as data in electronic form which are attached to or logically associated with other electronic data and which serve as a method of authentication. They allow someone receiving data over an electronic network to determine the origin of the data (“identity”) and to verify whether the data has been altered or not (“integrity”).

It is important that an electronic signature have an equivalent legal effect to that of a handwritten signature. The electronic signature must primarily ensure with certainty the identification of signatories and the authentication of the message sent. It must also constitute the proof of a transaction in the event of a dispute.

Following the conclusions of the Report of the *Conseil d’Etat* recommending the recognition of the legal value of electronic documents and signatures, the Parliament, on March 13, 2000, adopted Law N<sup>o</sup> 2000-230, which modified the Civil Code.

The Law recognizes the probative force of digital documents and electronic signatures. The notion of written evidence, thus far considered synonymous with hard copy, is now independent of its medium, establishing “electronic copy” as a wholly legitimate form of evidence. Electronic copy is not only admissible as evidence, but it is also given the same probative force as a hard copy when used as proof of a contract.

In addition, the law recognizes the legal value of electronic signature processes that fulfill the dual role of a signature: identifying the signatory and manifesting his or her consent to the content of the contract. Furthermore, the use of electronic signatures is facilitated by the establishment of a presumption of reliability for electronic signatures procedures that meet certain requirements. The Law provides that such requirements will be spelled out later in regulatory provisions.

In practice, electronic signatures are now made reliable by resorting to cryptographic techniques similar to those used for encryption. Among these is a third party certification procedure that has been encouraged. The data sent is accompanied by a certificate, issued by a certification service provider, which allows the recipient of a message to check the identity of the sender and the integrity of the message. Directive 99/93/EC primarily focuses on certification-service providers. It sets forth: (1) common obligations for these services to secure trans-border recognition of signatures and certificates throughout the EU; (2) common rules on liability to ensure confidence on the part of users, on the basis of certificates, and of services providers; and (3) cooperative mechanisms to facilitate trans-border recognition of signatures and certificates with non-Member countries.

## ***B. Cryptology***

Cryptology can ensure both confidentiality and security of electronic transactions, and some countries use encryption techniques without restriction. France, which had long been an exception with a particularly strict system of prior declarations and authorizations, was forced to take a softer line in order to promote a boom in electronic commerce.

To achieve this liberalization, the legislature passed Law N° 96-659 of July 26, 1996 followed almost two years later in February and March 1998, by implementation decrees concerning the declarations, authorizations, use, export and import of the means of encryption. The slowness of this process is explained by the conflict between the proponents of complete liberalization and the advocates of the retention of state control over this technology to preserve the interests of national defense and the internal and external security of the state. The provisions of the law can be summarized as follows:

The use of a secret coding method or service is freely allowed if it does not provide the assurance of confidentiality, particularly when it can be used only to authenticate a communication or ensure the integrity of the transmitted message; or if the method or the service assures confidentiality and uses coding conventions managed according to the procedures and by an organization approved under the conditions defined in article 28, Section II, of Law N° 90-1170, of December 29, 1990, on Telecommunications Regulation as Modified by the 1996 Law.

Confidentiality can be provided only by software using small-scale keys (40 bits) that can be decoded easily by the government. In order to encrypt at more than 40 bits, it is necessary to deposit one's secret code with a trusted third party (TTP). A well developed infrastructure is essential to secure approval from the Central Service for Information Systems' Security (the regulatory body for cryptography) for becoming a TTP. It is necessary to have authorized personnel, secured premises, and computer systems specifically devoted to that task.

The supply, import from countries not belonging to the European Union, or export of a coding method or service that does not assure confidentiality requires a simple declaration. The supply, use, import from countries not belonging to the European Community, or export of secret coding methods or services ensuring confidentiality requires the prior authorization of the Prime Minister.

The new Law received a lukewarm welcome from professionals, and after two years of implementation, it became apparent to the public authorities that this regime has more disadvantages than advantages. On January 19, 1999, the Prime Minister announced that the legal threshold of the key size would be raised from the current 40 bits to the international standard of 128 bits. He admitted that the 1996 law had not deterred criminal activity but instead had unduly restricted electronic commerce. Recognizing that changing the current law would take months, the government decided to immediately raise the legal threshold to 128 bits through regulatory action. In addition, the Prime Minister announced the drafting of a bill that would provide a far reaching liberalization of the constraints on the use of encryption. The bill would eliminate all restriction on the use of cryptology and the third party trustee deposit requirement. In order to satisfy public safety concerns, it would impose a duty to deliver to the judicial authorities, upon their request, a clear transcription of encrypted documents.

### III. Conclusion

Recent surveys show that France has been making up for lost time in electronic commerce over the past two years. Electronic business transactions between companies and their exchanges with government departments have been constantly increasing, as have electronic commercial transactions with the public. For example, in April 2000, 34.4% of the French Internet users visited an electronic commercial site, catching up with Germany (37.9%) and Great Britain (37.2%). The progress achieved is highly encouraging for the government, which has sought to encourage and facilitate this trend through a deliberately pro-active policy and by adapting French legislation. Additional bills are being drafted now to complete this framework. France continues to take an active role in the discussion of other key issues such as the development of a European secure payment system or the adaptation of taxation to electronic commerce to establish a genuine single market for electronic commerce within Europe.

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