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Implementation of the June 1st 2008 "Chatel" Law: changes for both subscribers of electronic communication services and cyber consumers.

The law for the development of competition at the service of consumers, commonly known as the "Loi Chatel" after the name of its initiator, and adopted after lengthy debates on January 3rd, 2008, was finally implemented on 1 June, 2008.

The text of the law, initially intended to increase consumers' purchasing power and encourage competition in general, was adjusted to reinforce consumer rights at each stage of their contractual relationship with cyber merchants, ISPs and mobile operators. This new system offers a set of rules protecting consumer interests both in subscribing to electronic communications services and in distance sales contracts.

- Electronic communication service contracts

A first point to be noted is that these contracts are those of Internet Service Providers (ISP), fixed and mobile operators, MVNO and cable operators.

• Duration of the contract

When electronic communication contracts contain a compulsory minimum duration, Article 13 of the law requires ISPs to indicate on the invoices how much time of the compulsory duration remains or the date by which it ends.
It should be noted that professionals have an obligation to indicate on invoices when the minimum performance duration of the contract has lapsed.

In addition, invoicing services which were initially free now require the consumer's express consent.
Electronic communication contracts, particularly mobile telephone contracts, previously frequently gave subscribers the benefit of free services when they signed the contract, however, when the free period ended, they automatically became pay services.
In this regard, the new law now obliges the operator to ask for the subscriber's express consent for being offered the services once they have become billable.

• The elimination of hotlines with a surcharge

ISP after-sale and technical assistance call hotlines must now be available at a set number at no additional charge.
In addition, ISPs can no longer charge their customers any waiting time before they are connected to a helpdesk agent while calling through their telephone network.
Only once the connection is made can a charge be applied for handling the request.

• More flexibility for termination conditions

The law offers subscribers the possibility of terminating their contract early, after a year, thereby limiting their termination costs to one quarter of the amount still to be paid for the remainder of the minimum contractual period.

- Distance sales contracts

Within the Chatel law scope, remote sales are understood to be "B-to-C" relations and to exclude financial services, which give them a very broad scope.

Under the law, online marketers are obligated to keep customers informed, particularly in the following areas:

• The final delivery date

The online sellers must inform the consumer before the contract is signed of the final date for delivery of the good or for provision of the service.
Otherwise it is deemed to have to deliver the good or provide the service immediately when the contract is signed.
Should the delivery/provision not be made on the indicated date, the consumer can, within 30 days, choose to cancel his order and demand a full refund for the goods/services purchased.
Note that the use of the word "date" instead of the term "period" may make this system inapplicable in practice, particularly for companies publishing mail-order catalogues.

• The right of retraction

Online sellers must also clearly inform consumers that they have a seven (7) day right of retraction and indicate which products and services are not included in this retraction right.

Although this information obligation previously existed, the law clarifies two points. Should the consumer decide to retract, the cyber merchant must refund "*all of the sums paid*" (which include delivery costs but not return costs) within thirty (30) days and "*by a means of payment*". The law therefore puts an end to the practice of refunds in the form of credit notes or purchase vouchers, which can now only be used upon the consumer's voluntary choice. It should be emphasised that the FEVAD (Federation of E-commerce and Distance Sellers) strongly objects to including delivery costs in refunds, particularly if the buyer chose a quicker and more expensive means of delivery.
Note that the law has not pronounced itself regarding delivery cost refunds in partial retraction cases.

• Tracking orders via a telephone number on which there is no surcharge

An online merchant must provide the public with "*telephone details at which he can actually be contacted*".
An online consumer must be able to contact the cyber merchants by telephone for the price of a local call to "*track the fulfilment of his order, exercise his right of retraction or implement the warranty*". Nevertheless, there is no obligation for online merchants to refrain from charging the waiting time.

Finally, a noteworthy point is that the law expressly gives the judge the power to automatically assert any provision of the Consumer Code that may be applicable in disputes submitted to him.

While the law's aim is to improve consumer information, protection and cost savings, there remains the looming concern of e-commerce players compensating for their earnings losses with higher consumer sales prices.
This move would considerably penalise consumers, contrary to what the Chatel Law had intended to achieve!

In closing, note that the considerably advantageous legal regime granted to consumers could enable ISPs and cyber merchants to change initially restrictive provisions into powerful sales arguments for consumers.

NEWS FLASH :

- **"PagesJaunes" trademark: The Paris "TGI" confirms the rights of the "PagesJaunes SA" company**

PagesJaunes SA must be considered as the sole owner of the "PagesJaunes" trademark, and as such has the right to have any third party's unlawful use of its trademark prohibited.

This is what emerged from the May 28, 2008 Paris Court of First Instance judgment, which sanctioned the Xentral company and its French subsidiary "l'Annuaire Universel" for infringement and unfair competition.

The latter two companies were accused of illegally using "pagesjaunes.com"'s name, both as the domain name of a website they operated and on their business documents.
The defendant companies were consequently ordered to pay damages of 150,000 Euros to "PagesJaunes SA" and to remove the domain names "pagesjaunes.com", "pagesjaunes.net" and" "pagesjaunes.biz" associated with their websites.

The Court additionally prohibited the defendants from using or reusing the trademark "PagesJaunes" in any respect whatsoever, particularly as a domain name or in business initiative.

Note that this decision corroborates with prior decisions taken by French and European Community courts.

In fact, in a March 30th, 2005 judgment, the Paris Court of Appeal had already recognised "PagesJaunes" as the sole owner of the "PageJaunes" trademark.

Similarly, in a December 13, 2007 decision, the European Court of First Instance had prohibited the Xentral company from filing the "pagesjaunes.com" Community trademark because of the risk of confusion with the French "PagesJaunes".

- **The issue of sponsored links before the ECJ: Which liability for Google?**

Following diverging case law on the nature of Google's liability with respect to the operation of its "Adwords" sponsored links service, the French Supreme Court decided, in three judgments pronounced May 20, 2008, to submit a series of questions for preliminary ruling to the European Court of Justice (ECJ).

As a reminder, Google's "Adwords" service provides a fee based online referral service. By purchasing selected key words associated with their products/services, advertisers can display ads linking to their website on Google's search result webpages. When a search is conducted using the same keywords as those purchased, these ads appear in the "sponsored link" section, positionned in the right hand margin or at the top of Google's search result webpages, depending on factors such as the price paid per keyword.

After noticing that advertisers were being proposed by Google to choose keywords reproducing or imitating their trademark to display links leading to sites offering infringing or competing products the trademarks holders of "Bourse des vols", "Vuitton" and "Eurochallenges" sued Google for copyright infringement.

Instead of settling the dispute as it was prompted to, the Supreme Court chose to defer to the ECJ for the interpretation of two Community directives by submitting several questions for preliminary ruling.

The first question was whether, by suggesting key words reproducing or imitating a registered trademark, Google is actually using this trademark, for which the rights holder is authorised to prohibit the use of on the basis of Article 5 of the December 21, 1988 trademark directive.

The second question is whether the same would be true in the case of a well-known trademark.

The Supreme Court asked the ECJ, if the use of a given trademark is not likely to be prohibited, whether Google can be deemed to be providing an information storage service as per referred to in Article 14 of the June 8, 2000 Electronic Commerce Directive?

As a reminder, if this were the case, Google's liability could only be incurred if the advertiser had previously informed the search engine of the unlawful use of its trademark.

The ECJ's reply is eagerly awaited, because it is likely to influence French case law, which has had to settle other Web 2.0 site-related disputes, particularly in regards to the dividing line of liability between publishers and hosters.

- **Unlawful content: The ISP's filtering obligation reaffirmed**

Is a hosters' implication a necessary prerequisite for an ISP to be ordered to block access to unlawful content?

The Supreme Court recently ruled in the negative, in the so-called "Aaargh" June 19, 2008 judgment case.

In this (court) case, several anti-racism and anti-Semitism associations had initiated a procedure against the American hosters of the "aaargh.org" French-speaking negationist site. Two of these hosters agreed to close the disputed site, while a third refused.

This prompted these associations to take action by the way of summary proceedings against the French ISPs, who as a result were obligated to block access to the "Aaargh" website.

ISPs' obligation to filter content was confirmed on November 24, 2006 by the Paris Court of Appeals, and was just reaffirmed by the Supreme Court.

To establish its ruling, the Court invoqued Article 6-1.8 of the Confidence in the Digital Economy Law of June 21, 2004, whereby the judicial authority can, in summary proceedings or to further a petition, order measures against hosters or other Internet services providers to put an end to the harm caused by a hosted site's content. The Court clarifies, however, that the ISP's obligation to set up filtering measures is not subordinated to the hosters' prior implication.

At a time when the French Government intends to enforce the signing by ISPs of a so-called "online confidence" charter, which would require them to put in place an active network monitoring system , the question remains as to whether this filtering is technically feasible. To be continued…

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