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Insights into specificities of the transfer of e-businesses under French law

In today's digital age, transfers of websites, in particular merchant websites, are on the rise.

The question of the legal nature of this type of transfer was of course raised. In this respect, the recognition of the existence of an e-business and, consequently, the application of the formalities relating to the transfer of "classic" businesses to this new type of transfer are no longer a matter of debate.

However, some specificities relating to the transfer of e-businesses should be dealt with cautiously, in particular with regard to the items to be transferred and the protection of personal data.

It should be preliminary recalled that, under French law, a business (i.e., a business going concern or *fonds de commerce* in French) comprises various items that are traditionally divided into intangible items (clientele, leasehold right, trade name, industrial property rights, etc.) and tangible items (goods and equipment), excluding real estate property. The most important item is the clientele, without which the business does not exist^[1].

A clientele can only constitute a business going concern if it is **real** and **certain**^[2] and if it is generated by an **independent**^[3] business activity.

In the absence of specific legal provisions on this specific issue, French legal scholars are clearly in favor of recognizing the existence of electronic business going concerns, also called e-businesses^[4].

Even though few court decisions have been rendered on this issue, it should nevertheless be noted that some of these decisions have acknowledged the existence of e-businesses^[5].

In practice, there is no doubt that companies, whose commercial activity is carried out exclusively via a website (absence of sales outlets in the physical world), have a real and certain clientele generated by an independent activity, i.e., the activity of the merchant website. In such cases, the transfer of the website is not a mere transfer of assets. It entails, de facto, the transfer of the business going concern as a whole.

Although this article is not intended to detail the formalities applicable to the transfer of businesses in France, the transfer of e-businesses has some specificities which deserve to be highlighted.

1. Specificities of the transfer of e-businesses with respect to the items to be transferred

1.1 Domain name

As a true “ID card” of the merchant website operator, the domain name is a significant and valued economic asset. It allows the identification of the e-merchant on the Internet. For this reason, the transfer of the domain name, simultaneously with the transfer of the business, is essential.

In practice, domain names are assigned by the *Association Française pour le Nommage Internet en Coopération* (literally French Association for Cooperative Internet Naming, or “AFNIC”) through the intermediary of registrars who act as intermediaries between the applicant or holder and AFNIC.

The holder of the domain name is the one who appears in the ‘WHOIS’ (<https://who.is/>), i.e., the database that provides information about the holder of a domain name.

Therefore, in case of transfer of the domain name as part of the sale of the business going concern, provision should be made to require the seller to contact AFNIC and to ask it to change the name of the holder of the domain name. It should be noted that this request for change must be made through a registrar.

1.2 Web-hosting agreement

The sale of a business going concern does not imply the automatic transfer of all existing agreements to the purchaser. Agreements are only transferred to the purchaser if the parties agree to such transfer or if such transfer is required by law^[6].

As such, if the website is hosted pursuant to a web-hosting agreement with a web-hosting provider, it will be necessary to analyze said agreement, in particular the clauses relating to its duration, its termination, its non-transferability, and possibly those relating to the transfer by the client of its business going concern. As a

matter of fact, web-hosting agreements commonly include a clause according to which the client may not assign or transfer the rights and obligations resulting from the web-hosting agreement in any form whatsoever without the written consent of the web-hosting provider.

1.3 Intellectual property rights

The existence of a website raises the question of the intellectual property rights applicable to the elements of the website.

It is therefore essential that the seller confirm to the purchaser that it is the owner of the rights to the creations used by the website and that such rights can be assigned.

In addition, at the time of the transfer, the legal provisions protecting copyright, as provided for under Articles L. 131-1 *et seq.* of the French Intellectual Property Code, must be complied with. In particular, the transfer of copyright is subject to the condition that each of the assigned rights is mentioned separately in the transfer agreement and that the field of exploitation of the assigned rights is delimited as to its scope and intended use^[7].

Non-compliance with some of these provisions may result in the nullity of the transfer agreement.

2. Regulations governing personal data protection

In addition to the specificities related to the nature of certain intangible items included in the e-businesses, particular attention must be paid to the regulations governing personal data protection.

Indeed, and almost systematically, the transfer of a business will lead to the transfer of a customer file likely to contain personal data – in particular the identity (first and last name), email address, telephone number or postal address of the persons registered in the database. In this context, its transfer can only be completed subject to compliance with the General Data Protection Regulation (“GDPR”)^[8], both as regards the lawfulness of the customer file transferred and post-transfer information.

2.1 Lawfulness of the transferred/assigned customer file

2.1.1 *The customer file must contain only the data of active customers*

It should be preliminarily recalled that customer data used for commercial prospecting purposes may be kept during the business relationship, and then, except in exceptional cases, for a period of 3 years from the end of this business relationship (for example, from a purchase on the website or from the last contact from the customer), in accordance with the recommendations of the French Data Protection Authority (*Commission Nationale de l’Informatique et des Libertés*, commonly known by its acronym CNIL).

2.1.2 *Only the data of customers who have not objected to the transmission of their data or who have given their consent to such transmission may be sold*

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The data of customers who have objected to the transmission of their data for the purpose of postal or phone prospecting and those who have not consented to the transmission of their data for the purpose of prospecting through electronic means of communication must be deleted from the customer file before it is transmitted to the purchaser.

In addition, the conditions for the transmission and delivery of the data between the seller and the purchaser must be carried out in such a way as to guarantee the security and confidentiality of the data.

2.2 Post-acquisition obligations incumbent on the purchaser

2.2.1 The purchaser must provide clear information to the customers

The purchaser must comply with certain rules to ensure that the use of the customer file complies with applicable regulations.

First of all, it must inform the customers as soon as possible (in particular during the first contact with the relevant customer) and, at the latest, within one month from the completion of the transfer, unless the customers have already received the necessary information^[9]. This information must include the source of the data, i.e. the name of the company that sold the customer file.

2.2.2 The purchaser must verify the existence of consent to prospecting through electronic means of communication

If the purchaser wishes to use customer data for the purpose of prospecting through electronic means of communication after the transfer has been completed, it must be able to demonstrate that it has collected the informed consent of the relevant customers.

Two scenarios can be distinguished:

Scenario #1: The seller has already collected the consent of its customers for the purchaser's prospecting activities.

If, at the time the data were collected, the purchaser's identity was already on the list of companies to which the data could be transmitted for the purpose of prospecting through electronic means of communication (because the purchaser was a business partner of the seller), the purchaser will be able to directly prospect individuals who have consented to the transmission of their data for such purpose.

Scenario #2: The seller has not collected the consent of its customers for the purchaser's prospecting activities.

If the seller has not collected consents for the purchaser, the purchaser must ensure compliance of its prospecting activities through electronic means of communication by collecting the consent of the relevant customers prior to any commercial prospecting activities through electronic means of communication.

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- [1] Plenary Assembly of the *Cour de Cassation* (French Supreme Court), April, 24, 1970
- [2] Commercial Chamber of the *Cour de Cassation* (French Supreme Court), March 13, 1962
- [3] Civil Chamber of the *Cour de Cassation* (French Supreme Court), October 22, 1974, No. 73-12.372
- [4] See in particular: T. Verbiest, *Le fonds de commerce électronique : vers une reconnaissance juridique ?* : Comm. com. électr. 2008, étude 10. ; Guillaume Desgens-Pasanau, Fasc. 1080 : *NOTION DE FONDS DE COMMERCE ET INTERNET*, JurisClasseur Entreprise individuelle ; Suzel Castagné, Fasc. 1932 : *FONDS DE COMMERCE. - Fonds de commerce électronique. - Cession*, JurisClasseur Entreprise individuelle.
- JurisClasseur Entreprise individuelle
- [5] See for example Paris Court of Appeals, January 28, 2005
- [6] French law requires that the following contracts/agreements be transferred to the purchaser, even if the transfer agreement does not include any provision to that effect: the leasehold right governed by the rules applicable to commercial lease agreements; current employment contracts and insurance contracts.
- [7] Article L. 131-3 of the French Intellectual Property Code
- [8] Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)
- [9] See article entitled "*Vente de fichiers clients : la CNIL rappelle les règles*" : <https://www.cnil.fr/fr/vente-de-fichiers-clients-la-cnil-rappelle-les-regles> (in French only)

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