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MANAGING THE STOCK OF LEGISLATION – EXPERIENCES, OPPORTUNITIES AND CHALLENGES

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The online publication of legislation

The example of France's official legal portal: Legifrance

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The French authorities have always paid special attention and devoted significant resources to the dissemination of national law, to ensure a good implementation of the rule of law and legal security by suitable information of the public but also, some say, to support the influence of French law abroad. The rise of information technologies has boosted the prospects for dissemination of legal information. Owing to this longstanding commitment to giving access to the law, the first legal databases were established back in the early 1960s in cooperation with universities and the courts. These ground-breaking efforts laid the foundations for the “public service of dissemination of legal information” (known under the name of its internet portal: Legifrance), which was created in 1998 and completed in its present form in 2002. The purpose of this memo is to examine the achievements of Legifrance and to identify the factors of success that make it an example of best practice in the area of access to legislation.

What is made available on or via the site Legifrance? The types of norms and other texts concerned are briefly listed on the site itself.¹

- Normative texts:
 - the current constitution, including previous versions and with links to the constitutional court decisions useful for clarifications;
 - 60 official codes as ratified by Parliament;
 - primary and secondary legislation:
 - Full text searchable database of norms enacted since 1990;
 - Fac-simile of Official Gazette texts from 1978 to 1990, searchable on title and metadata, including texts repealed in the meantime;
 - Fac-simile of all legislation still in application since the origin (first text 1537).

¹ http://www.legifrance.gouv.fr/html/aproposdroit/aproposdroit_uk.htm (section 7, in English)

- Legislation applying international commitments: treaties and agreements signed by France, selected international conventions (example: UN Charter) ;
- EU law: links to databases of directives and regulations on the Commission site, and searchable database of transposition measures.
- Collective conventions (negotiated between social partners and ratified by the Government), including past versions, searchable on key-words;
- Case-law : All case-law decisions are amended to delete any names and private details, as instructed by the National Commission "Informatique et Libertés" (CNIL)
 - Constitutional Council: full text of the decisions, actions since the origin (1958) and notices of the Government since 1995.
 - Decisions and judgments rendered by the Constitutional Council, State Council, Court of Cassation and Court of jurisdictional issues ;
 - Judgments rendered by the Audit office;
 - Judgments rendered by other judicial and administrative jurisdictions, that were selected according to certain criteria;
 - Judgments rendered by the European Court of Human Rights and the European Commission of European Rights;
 - Decisions rendered by the European Court of Justice and the European Court of First Instance.
- Official publications:
 - Primary and secondary legislation, as published daily in electronically certified format in the official gazette;
 - Ministerial Official Bulletins which include internal, non prescriptive texts;
 - The Official Journal of the European Union.

This represents a particularly impressive amount of information, and the search capacities make it a truly useful tool for anyone needing to ascertain the current state of the legal framework in any area of legislation.

Legal basis of Legifrance

The legal value of online documentation has been a subject of concern since the origin. Legifrance was from the inception conceived as a formally recognised communication tool for the public authorities, and provided with the necessary legal basis. The most recent text covering the issue is the *décret* n° 2002-1064 of 7 August 2002 which consolidates previous texts and lists the types of legal normative documents that are to be made available at no cost to the public. Detailed rules of operation were set out successively by two ministerial decisions (2 February 1998² and 9 October 2002, ³ principally to cater for handling of nominative information, with special focus on case law.)

Principles underlying the French approach

² <http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=PRMX9903642A>

³ <http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=PRMX0205968A>

Legifrance is categorised as an “administrative public service” under French law, which carries privileges but also constraints, such as continuity, reliability and accuracy, and requires that it not interfere unduly with private sector initiative. The idea of free access (without fee) was promoted by the law of 12 April 2000⁴ on the “rights of citizens in their relationship with the administration”. Article 2 guarantees “the freedom of access to the legal rules applicable to citizens” and requires regulators to organise an “easy access” to the rules that they issue. Intelligibility has been recognised as a principle of constitutional value in a Constitutional Council's decision n° 99-421 DC of 16 December 1999⁵. This principle was put to the test in the review and subsequent repeal of an article of the 2006 budget, on the grounds of “excessive complexity”.⁶

To make effective the principle intelligibility, the Prime minister's office promotes quality of legal drafting in ministries, by publishing an official manual (the “legistics handbook”⁷) which sets out in detail the process leading to drafting and publishing consistent and error- normative texts.

Ethical issues

In accordance with legislation concerning the handling of personal information by electronic processes, the compliance of the scope and rules of operation of the Legifrance website with ethical standards was checked at inception, before final rules were published, by a kind of civil rights watchdog, the Commission nationale informatique et libertés (CNIL). Recommendations from the commission, couched in a (not published online) letter to government dated 22 June 1999, were influential in the choice of final details of the scheme.

To ensure that the best use is made of the website, an **advisory committee** was also set up by the 2002 décret to monitor and evaluate achievements: the “committee of the Public Service of Dissemination of French Law on the Internet”. The committee can also sort out conflicts that may arise from the use of licenses and make proposals for the continuous improvement of the quality of the service. It files a yearly evaluation report (which is published) and generally assists in the dissemination of legal data on the Internet.

Intellectual property issues

Even if the décret of 2002 posed the principle of open access gratis to the body of legislation and other sources of law, the public authorities did not relinquish all control over the use of the information⁸.

- some material is copyrighted, such as the translations into foreign languages of the codes and the analysis of case law, and therefore cannot be re-used without proper accreditation;
- downloads and re-use of substantial volumes of data are subject to licensing. By application of general intellectual property legislation, these rules target qualitative and quantitatively significant downloads, which are defined on the site, visibly on the basis of their commercial potential⁹. The catalogue of the existing databases, the volume of their contents and the price of the licenses¹⁰ are all published on the site. It is not easy to assess whether the license fees are

⁴ <http://www.legifrance.gouv.fr/texteconsolide/PPEDQ.htm>

⁵ <<http://www.conseil-constitutionnel.fr/decision/1999/99421/index.htm>>

⁶ Decision n° 2005-530 DC - 29 December 2005

<http://www.conseil-constitutionnel.fr/decision/2005/2005530/index.htm>

⁷ http://www.legifrance.gouv.fr/html/Guide_legistique/accueil_guide_leg.htm

⁸ http://www.legifrance.gouv.fr/html/licences/menu_licences.htm

⁹ http://www.legifrance.gouv.fr/html/licences/licences_notice.htm

¹⁰ http://www.legifrance.gouv.fr/html/licences/licences_tarifs.htm

high or not, but it is a fact that the resources drawn from fees represents only a fraction of the cost of setting up and running the website.

- post-back to Legifrance are authorized, indeed encouraged: webmasters are free to post links to Legifrance material on their sites, without control or prior authorisation.

Paper versus electronic, which is legal?

The appearance of free internet access to legislation, including the Official Gazette, has posed the issue, in all European countries, of the legal value of the online publication. Could it be considered as equally binding as the paper copy? To give the appropriate guarantees to users, new rules about the publication of legislation were necessary to clarify these matters. In France, a 2004 ordinance,¹¹ which is well explained by an introductory report¹², introduces the principle that certain categories of legal acts may, or may not be published online. For certain categories of texts, "owing to their nature, their importance and the persons to whom they apply, the publication in the official Journal in an electronic form suffices in order to ensure their entry into force", i.e. there is **no need to print a paper copy**. An implementation décret¹³ listed five such categories, which include internal rules applying to the organisation and staffing of the administration, decisions concerning budgetary appropriations, and HR decisions.

This scheme was challenged in court as to its compliance with higher texts. The Conseil d'Etat ruled that¹⁴ « the substitution of the electronic version to the paper version of the official Journal made by the ordinance of 20 February 2004 is not likely to infringe on either Article 10 of the European Convention on the Protection of Human Rights and Fundamental Freedoms by virtue of which every person is guaranteed the right to the freedom of expression and the one to receive or communicate information or ideas without any interference from the authorities, nor the non-discrimination clause mentioned by Article 14 of the same convention » (unofficial translation.) Confronted with a similar claim, the Belgian Court of Arbitrage¹⁵ ruled differently: « If it is not accompanied by sufficient measures capable to guarantee the equal access to official texts, the contested measure (the publication of the *Moniteur belge* exclusively on the Internet) has disproportionate effects at the expense of certain categories of persons. It is not therefore compatible with Articles 10 and 11 of the (Belgian) Constitution »¹⁶. This ruling however did not lead to any significant change to the reform.

Limited impact of the EU directive on re-use of public sector information

The compliance of Legifrance with new EU legislation had to be checked in 2004, following the publication of Directive 2003/98/EC on the re-use of public sector information (PSI)¹⁷.

The French authorities have always closely regulated access to administrative documents, from a civil rights point of view, to better channel the administration's discretionary power to limit access. The emergence of digital channels had already been taken into account and long-established principles had been adjusted in the light of new communication and storage

¹¹ <http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=JUSX0300196R>

¹² <http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=JUSX0400033R>

¹³ <http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=PRMX0400087D>

¹⁴ Conseil d'Etat, 9 November 2005, case n°271713

¹⁵ Belgian Court of Arbitrage, case n° 106/2004 of 16 June 2004

¹⁶ A full analysis of this episode is provided on :

http://www.servicedoc.info/spip.php?page=article&id_article=377

¹⁷ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0098:EN:HTML>

possibilities to give Legifrance a firm basis.¹⁸ For that reason, Directive 2003/98/EC, when it had to be transposed in French law in 2005, did not require any major change to the existing rules.

¹⁹ The PSI Directive promotes two principles of the internal market: transparency and fair competition. It sets minimum rules for the re-use of PSI throughout the European Union. In its recitals it encourages Member States to go beyond these minimum rules and to adopt open data policies, allowing a broad use of documents held by public sector bodies. In France, the transposition texts (ordinance of 2005 and its implementing décret²⁰) recognised that by default all public information can be re-used for commercial or non-commercial purposes, and ordered administrations to facilitate the exercise of the new right. It provided for the appointment of an official responsible for reuse in each administration, placed the regime of reuse under the control of the well respected commission for access to administrative documents (CADA) and imposed that any refusal to authorise the reuse be motivated in writing. It also limited what administrations could charge (reasonable fees only) for the service. Legifrance had largely anticipated the new trends visible in the EU directive, and did not need to introduce major changes as a result of its publication.

Assessment and lessons learnt

Legifrance has been operating since 1998, and has been upgraded several times. It has achieved considerable results due to a number of success factors:

- It is run by the very same service which supervises the “production” of new norms, a process which in France has always been closely connected with publication in the official gazette. The historical expertise in developing and disseminating legal texts was transposed without loss to the electronic world;
- The strong current for improving the citizens’ access to law as a pre-requisite for democracy, confirmed in the 2000 law, guaranteed political support for the scheme. Legifrance now provides the general public and the legal professions with a precious instrument of access to up-to-date versions of most legal norms. The **quality of the legal consolidation** of texts, though criticized by some legal expert is a key feature: it is possible to track all amendments of a given article from its initial state to current version, and even reconstitute the state of a piece of legislation at any time in the past; consolidation concerns embodied by Legifrance are now anticipated at the stage where the new text is drafted;
- In spite of the institutional complexity of the law-making and reviewing processes, a single window for access to the multiple databases of legislation and case law, has been set up, without forgetting the European and international dimension, thanks to the power of technology;
- A balance has been found between openness and low-cost for the user on the one hand, responsibility for controlling the use of public information on the other hand. Setting up an online database is not only a technical, it is also a legal issue.

¹⁸ For background, see <http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=JUSX0500084P>

¹⁹ <http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=JUSX0500084R>>

²⁰ <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000265304&dateTexte=>

Legifrance is most probably a leader among its peers. Though 16 out of the 27 European member states have set up similar databases, only Belgium²¹ and Spain²² have developed such sophisticated applications and rich data repositories. With 6 million unique visitors a month, the number of pages consulted is over 50 million a month, showing how useful the site is considered by the public. Much legal drafting in ministries has been considerably accelerated and legal certainty strengthened by this new tool.

Improvements can still be expected, especially in the functionalities of the website and its search engine. Though it is widely used and acclaimed, the site and database still attract some criticism in the blogosphere²³, summarized in the Wikipedia article. Their merit is to be near perfect legally speaking, but user-friendliness could still be improved, though the sheer bulk of the repository poses technical problems when it comes to improving the interface. The effort to put official texts in the public domain extends to non-legally binding norms. Since December 2008, standing instructions are now also online on www.circulaires.gouv.fr though the presentation and functionalities are still quite basic.

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²¹ www.belgiquelex.be

²² www.boe.es

²³ <http://frederic-rolin.blogspot.com/archive/2008/01/17/legifrance-2-0-un-symptome-de-la-mort-du-service-public-a-la.html>