



## PRIVACY OF OFFER AND ACCEPTANCE IN ELECTRONIC CONTRACTS

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### **Abstract:**

*The contract concluded in the digital environment has a peculiarity that distinguishes it from the traditional contract, and since the offer and acceptance are the main pillar of any contract, including the electronic contract, the spread of electronic transactions imposes a study of privacy that distinguishes them in the digital environment, both in terms of their legal definition or in terms of the characteristics that characterize the electronic offer as the will that initiates the contract, while determining its legal nature in the digital environment. As for electronic acceptance, it is expressed through several electronic methods and media, including that it is expressed via e-mail, or by clicking on the admission icon on the website, or by chat and direct viewing, and the specificity of electronic admission is highlighted in the determination of the right to withdraw from it and in the invalidity of silence to express acceptance in the digital environment, the special nature of the electronic offer and acceptance is the one that imposed a special legal regulation, or At least a legal adaptation of traditional legal texts in line with this privacy that would enhance trust in electronic transactions.*

**Keywords:** *Electronic contract, Offer and acceptance, Digital environment.*

### INTRODUCTION


With the development of means of communication in the digital age, the world has become more connected than ever, and this great development has affected various aspects of life, and we have recently noticed a remarkable shift towards relying on electronic contracts as a means that has become the main means of conducting various commercial and service transactions.

Electronic contracts are a flexible and innovative way that allows people, whether individuals or companies, to conclude contracts quickly and easily, away from the complexities that characterize traditional contracts. However, this shift is not without special legal challenges related to the concept of offer and acceptance, the two wills that form the basis of the contract, as communication between the parties in the digital environment is indirect and through multiple and varied electronic media, which complicates the issue of identifying the will of the parties, which directly affects the establishment of the contract mainly and the credibility of transactions that take place in the digital environment, and from it came the following problem: How does the specificity of offer and acceptance in electronic contracts affect the clarity of intentions of the contracting parties?

This research paper aims to study the privacy aspects of electronic offer and acceptance, and what distinguishes them in the field of electronic contracts by studying their definition and characteristics in the digital environment, and clarifying the mechanisms of expressing electronic offer and acceptance. In doing so, we followed the descriptive approach to define concepts, identify jurisprudential and legislative opinions, and analyze the relevant legal texts.

We have divided this research paper into two axes, the first axis dealt with the privacy of the electronic offer, through which we studied the definition of the electronic offer, its characteristics, the language in which it is carried out and its legal nature, and the second axis we devoted to studying the privacy of electronic admission, where we touched through it to the definition of electronic acceptance and ways to express it, as we studied the validity of silence to express acceptance as well as the right to withdraw from it, and we concluded the research with a conclusion that included the results of the study.

**The first axis: the privacy of the electronic offer**



In Law No. 18/05 of 10/05/2018 on e-commerce (1), the Algerian legislator did not use the term offer, but used the term "electronic commercial offer" to denote the offer that constitutes electronic commercial transactions, as Article 10 of it stipulates: "Every electronic commercial transaction must be preceded by an electronic commercial offer and documented by an electronic contract ratified by the electronic consumer."

We will address the definition of an electronic offer, its characteristics, language and legal nature as follows:

#### **1- Definition of an electronic offer:**

The offer is defined according to the traditional rules of contracting as: «an offer issued by a person who expresses firmly his will to conclude a certain contract so that if it is accompanied by an identical acceptance, the contract is concluded(2), The electronic offer in contracts concluded in the digital environment does not differ from the offer in traditional contracts, except in terms of its description in view of the means used to express it< imposed by the environment in which the contract is concluded, so we find jurisprudence defines it as: «A firm expression of will that takes place through communication techniques - whether audible or visual or both - and includes all the basic conditions and elements of the contract to be concluded so that the contract is concluded if it is accepted»(3)

The European Directive of 20 May 1997 on consumer protection in the field of telecontracts defines the offer in telecontracts as: "Any telecommunication containing all the necessary elements so that the addressee can accept the contract directly and exclude advertising from this scope"(4).

As for the Algerian legislator, the offer in Law No. 18/05 on electronic commerce was termed the term electronic offer, as we have already indicated, and the legislator has specified its conditions in the text of Article 11 thereof, and the legislator also stressed that the electronic offer, i.e. the electronic commercial offer, is the one that enables the conclusion of the contract as soon as the acceptance is associated with it because it contains the desire to contract and the basic conditions of the contract,(5) Article 12/1/3 of the same law stipulates: «- Confirmation of the order leading to the formation of the contract.».

Therefore, although the electronic offer or electronic commercial offer does not differ fundamentally from the traditional offer, it is characterized by characteristics imposed by the digital environment.

#### **2- Characteristics of the electronic offer:**


As the electronic commercial offer takes place in a digital environment and by electronic means, it has some privacy compared to the traditional offer, its specificity is that it is an offer of an international nature and takes place remotely through electronic media, which we explain as follows:

##### **A- The electronic offer is of an international nature:**

Since an electronic offer is made through the international digital network for communications and information, which is characterized by openness and universality, an electronic offer is an offer of an international or global nature that does not adhere to the geographical or political boundaries of States,(6) although the electronic offer can be restricted within the boundaries of a specific geographical area, provided that the geographical scope is determined so that the offeror is not bound to contract outside the predetermined geographical range.(7)

##### **B- The electronic offer is made remotely:**

According to the text of Article 6/2 of Law No. 18/05 on electronic commerce, the contract concluded in the digital environment is characterized as a contract that is concluded remotely without the actual and simultaneous presence of the parties to the contract, by resorting to electronic communication technology, and therefore the electronic offer has the same characteristic, which is that it is done remotely, so the legislator stressed the need to contain all the contractual conditions that enable the consumer to contract with knowledge and knowledge.(8) The conditions that an electronic offer must contain are set out in detail in the text of article 11 of Law No. 18/05 on Electronic Commerce.



Where the electronic commercial offer must be carried out in a visual, readable and understandable manner and includes a minimum of information mentioned by the legislator, for example, but not limited to the text of Article 11 of Law No. 18/05, including, for example, data that identify the merchant and his commercial activity such as tax number, commercial registration number or professional card and his phone number, in addition to information related to the commodity itself (i.e. sold) in terms of nature, characteristics, price and proposed services, and information related to the conditions of sale, especially what it is related to the protection of consumer personal data, in addition to the development of data related to the implementation stage, the after-sales stage such as warranty, payment terms, termination terms, method of confirming or canceling the order, the time and place of delivery, the method of return, replacement or compensation, as well as the validity period of the offer or electronic commercial offer.(9)

### **C- The electronic offer is made through electronic means:**

An intermediary is defined in the UNCITRAL Model Law on Electronic Commerce of 1996 (10) specifically in the text of article 2/e as "a person who, on behalf of another person, sends, receives or stores a data message or provides other services in connection with such data message".

An electronic offer is characterized by the fact that it is made through an electronic medium, that is, it is only made through the Internet service provider and with the contribution of many people to the communication, such as the telecommunications operator and the information provider, knowing that the offeror can be the same as the Internet service provider (11).

What is important is that the offer cannot be achieved by its legal existence as soon as it is issued by the offeror, but its legal existence and validity are achieved to arrange its legal effects from the time it is presented on the digital network through the electronic medium so that it remains in place throughout the period of its presentation on the network and ends when it is withdrawn or disappears from the Internet.(12)

It should be noted that the electronic offer has several forms according to the electronic medium through which the offer is expressed, so the offer can be directed via e-mail to the person where an electronic message is sent to the contractor containing all the conditions for the validity of the offer set by the legislator, or the electronic offer may be directed through conversation or viewing, in which there is simultaneous communication between the two parties and it is considered a contract between those present by virtue of a ruling in one contract, and the electronic offer may be issued through the site Web-site, where the offer is directed to the public and continuous and is usually limited by the running out of quantity(13).


### **3- The language of the legal offer:**

As the electronic offer is of a global international nature, it may be in a language other than the language of the addressee, and at one stage the problem of language and its impact on the clarity of the terms of the contract for the acceptor has arisen, as the offer may carry phrases that he does not understand from the face of the offer, so he cannot negotiate, and he may contract without understanding by clicking on the request confirmation icon unintentionally because he is ignorant of the language. However, the problem of language did not stand in the way of contracting in the digital environment, as most international websites, especially those with wide spread, displayed their content in many international languages, to ensure communication with the largest number of customers. It also relied on providing simultaneous and complete translation of its content and offers in order to facilitate customers and attract them to contract (14).

As for the Algerian legislator, in the Electronic Commerce Act, it did not fully indicate the language in which the offer must be made, in other words, it did not stipulate in the conditions for the validity of the offer that the offer must be issued in the national language.

### **4- The legal nature of the electronic offer:**

The electronic offer may be addressed to one or several specific persons when it is made by conversation or via e-mail, and it may also be addressed to all people via the digital network, so the person of the contractor is not considered in the contract, so a jurisprudential debate has arisen about the legal nature of the electronic offer addressed to the public, whether it is an offer



in the legal sense or just an invitation to contract? Among those who consider the electronic offer addressed to the public through a website as a mere invitation to contract, justifying this by the fact that the offeror cannot count the people who will receive his offer in terms of number, and therefore cannot say for sure that the goods available to him are sufficient to meet all the demand for them, and therefore we find the offeror often includes the phrase "the offer is valid until the quantity runs out". On the other hand, others believe that the offer to the public through websites is positive when it includes the essential elements of the contract to be concluded.

In summary, there is no doubt that an offer addressed to certain persons is positive in the legal sense, while an offer addressed to the public is often an invitation to negotiation as long as it does not contain the essential elements of the contract or contains the phrase "the offer is valid until the quantity runs out",<sup>(15)</sup> or the phrase "after confirmation" or "without obligation", according to which the person expands his freedom and leaves room for the rejection of unsatisfactory requests<sup>(16)</sup>.

### **Second: Electronic Admission**

Acceptance is the second will in the contract, if the offer is issued and accompanied by the identical acceptance, the contract is concluded and in turn enjoys a privacy imposed by the nature of the digital environment, so we will study the definition of electronic acceptance and show ways to express it, and the validity of silence to express electronic acceptance and the right to withdraw from acceptance as follows:

#### **1- Definition of electronic admission:**

Electronic acceptance is an expression of the will of the person to whom the offer is addressed is done remotely via electronic means through the digital network, and it is subject to the general rules as an asset, as it does not differ from the traditional acceptance except in terms of the means used to express it, and therefore it must be identical to the electronic offer and does not contain any change in it, otherwise it is considered a new offer that needs to be accepted<sup>(17)</sup>.

Even the UNCITRAL Model Law on Electronic Commerce of 1996 provided in its article XI that the use of data messages to express an electronic offer and acceptance was authorized and the contract was valid. <sup>(18)</sup> Legislation does not require a specific form or status for electronic acceptance to be issued unless the offeror requires acceptance to be issued in a particular form or legislation requires that, as there are some legislations that impose, for example, that acceptance be made in the same way as the offer is received<sup>(19)</sup>.

For example, if the offer is received by e-mail, the unconditional and unmodified electronic acceptance in the offer must be made via e-mail and not through another electronic means, and by referring to the texts related to e-commerce, we do not find that the Algerian legislator has stipulated a similar condition for that, and thus electronic acceptance can be made by other than the electronic means by which the electronic offer was received.

However, the nature of electronic acceptance as it is carried out through modern communication technologies has imposed some technical specificity that characterized it, although it does not require a specific form to express acceptance, but we find the Algerian legislator explicitly stipulated in Article 12/5 of Law No. 18/05 on electronic commerce that acceptance must be expressed explicitly, with a peremptory rule that cannot be violated. After and by technical means, the requirement that the expression of acceptance be express prevents the contractor from falling into confusion or ambiguity as to the will of the contractor that may be caused by automated technical means.

#### **2- Special ways to express electronic acceptance:**

The nature of transactions in the digital environment imposes special ways through which the will is expressed, including electronic acceptance, differs from the traditional methods known in the general rules, and the most important of these methods are the following: Express acceptance via e-mail or by clicking on the acceptance icon or by conversation or live viewing, as well as by downloading, we briefly explain them as follows:

**A- Express acceptance via e-mail:**

Acceptance herein shall be expressed in writing by sending the consent via e-mail, or sending the electronic signature in a manner that ensures its integrity and non-modification.(20) The expression of acceptance via e-mail is no different in that it is considered an express acceptance and is valid even if the offer is not made by e-mail (21).

With regard to writing via e-mail, the Algerian legislator considered that it has the same authority as ordinary writing in the text of article 323 bis 1 of the Algerian Civil Code (22).

**B- Express acceptance by clicking on the acceptance icon:**

Commercial companies usually take certain pages that are their site on the Internet, where these pages or sites display their products and services and advertise them steadily and continuously, so that this is considered a general offer to Internet users who can view the offered goods and services, their specifications and price (23).

The acceptance is expressed by writing or clicking on the acceptance icon, where the website has an approval box on which the phrase "I agree" in Arabic, "J'accepte l'offre" or "D'accord" in French, or the phrase "I agree" or "Ok "" in English, and admission is done by clicking once on the admission icon or by clicking twice to ensure the validity of the acceptance. Clicking twice is evidence of the acceptor's consent to the conclusion of the contract and there is no argument that clicking once was by mistake (24).

The offeror can make the acceptor express his acceptance by clicking twice and in two different places on the screen to ensure the true will of the acceptor, he clicks on the first icon on the contract terms page, while the second icon that he clicks on is found on the acceptance confirmation page,(25) or on the model contract page that specifies the terms of the contract, which appears after the first click, if the contractor wants to complete the contract, he clicks on the acceptance icon or writes a phrase stating the approval. (26) As for the Algerian legislator, article 12 of Law No. 18/05 on electronic commerce requires that the order go through three stages until the order is confirmed, which leads to the formation of the contract.

Also, the offeror sometimes inserts some procedures after the issuance of acceptance, such as requesting some information and data on the page such as name, address, phone number, number and type of credit card, and the aim is to confirm acceptance and conclude the contract with a firm and firm will on the part of the acceptor(27).

**C- Expression of acceptance through chat or live viewing:**

Chat rooms have spread as a modern means of communication via the Internet quickly, due to their international character and ease of use, and they also facilitate the expression of will between the parties to the contract through direct and simultaneous conversation between the two parties, whether through direct writing in which each party appears directly what the other party writes or by exchanging oral talk using the device's headphones, or that the will is expressed through conversation and watching together using the camera of the device connected to the Internet, where Audio and video communication (28).

In this case, the expression of will is considered to have taken place in a virtual contract council, just like the telephone, since the two contractors communicate directly, either in writing, verbally or using the circulating sign, and therefore this expression of acceptance is considered an express expression according to the text of Article 60 of the Algerian Civil Code.

**D- Express acceptance through remote uploading:**

Remote download or remote download "Download" means: «Transfer a program or some information to the customer's computer via the Internet, so that the customer obtains this program or this information without the need to use the normal means of placing programs on the computer via a floppy disk, or a CD» (29) In this way, the person concludes and executes the contract directly remotely and without the need for the outside world (30).

**3- The power of silence to express electronic acceptance:**

The contract via the Internet is absent in which the actual convergence between the parties because it relies on electronic media, so a question arose about the validity of silence to express electronic acceptance?, as the principle in the general rules is that it is not attributed to the silent

saying, and that the expression of acceptance must be explicit or implicit, and the law does not consider silence clothes except as an exception in two cases:

- If the nature of the transaction, commercial usage, or other circumstances indicate that the offeror would not have waited for a declaration of acceptance, the contract shall be deemed to have been concluded if the offer is not rejected in a timely manner.
- If the offer relates to a previous transaction between the contracting parties.
- If the offer is in favor of the person to whom it is addressed (31).

These exceptional cases only apply to traditional contracts while they cannot be implemented in electronic contracts, as the novelty of contracting via the Internet denies that custom has an effective role in the field because there are not many and stable transactions to the point of considering it customary, and for the offer that does not wait for acceptance, it is in donations that do not oblige the acceptor to any obligation, and this is unusual in electronic transactions in which the offeror is usually a trader. It is difficult to consider the previous transaction as a reason to consider silence as acceptance unless there is an agreement between the parties to do so (32). If some believe that the only exceptional case that can be implemented in electronic contracts is the case of a previous transaction between the contracting parties, if the buyer buys goods from an electronic store continuously and regularly using any electronic means, then if the site or online store sends an offer to his customer offering to provide him with goods, the customer's silence is considered acceptance if he does not reject the offer (33).

However, we believe that silence is not suitable for expressing acceptance in electronic contracts at all, especially since the Algerian legislator explicitly stipulated in the text of Article 12 of Law No. 18/05 on electronic commerce that the acceptance be explicit and did not even consider the tacit acceptance of the contract, as acceptance in the electronic contract differs from traditional acceptance in terms of not taking neither tacit acceptance nor silence clothes, especially since it is done through electronic media through which it is difficult to stand on the implicit will of the contractor and on the circumstances of silence, which may be due to lack of access to the offer or a technical defect in the device or otherwise, not all the general rules that apply to traditional contracts can be applied to the electronic contract.


#### **4- Withdrawal or withdrawal of electronic admission:**

The right of reversal is defined as: «an expression of an opposite will according to which the owner of an act or expression of a unilateral will intends to withdraw his will and withdraw it as if it were not in order to empty it of all trace in the past and the future» (34) The reversal is based on three elements, the first is that it is done by the unilateral will of the midwife, and the second is that the right of reversal is an expression of two opposing wills, the first was expressed under the influence of temptation and publicity, and the second came after reflection and reflection, and the third element It aims to empty the first expression of acceptance of all legal effect, thus dissolving the doctrinal bond and stripping it of its past and future effects.

This is a departure from the general rules that stipulate that the contractor may not withdraw from the contract of his own free will, and if the acceptance corresponding to the offer is issued and accompanied by it, the contract is concluded and its implementation becomes binding on the parties. However, the specificity of electronic contracts in which the contractor is unable to physically inspect the commodity and familiarize himself with it and the characteristics of the service before concluding the contract, the legislation has decided that he has the right to withdraw or withdraw from the contract within a certain period that begins to be calculated from the date of receipt, so that this period varies from one legislation to another (35).

For example, European Directive No. 97/07 on consumer protection in telecontracting limits the recourse period to at least seven working days, so that the consumer has the right to withdraw without explaining the reasons and without being subjected to penalties, as he bears only the costs of returning the goods, which is the same as French law (36).

As for the Algerian legislator, he did not talk about the right of reversal in the same sense in Law No. 18/05 on electronic commerce, where it stipulated that the electronic consumer has the right to retreat and return the product in its condition within a maximum period of four working days



starting from the date of actual delivery of the product, but this decline is specific in certain cases and conditional, unlike the reversal in force in remote contracting in comparative legislation, as the reason for the decline must be either lack of respect for the supplier For delivery or delivery of a non-conforming or defective product, as in the last two cases, the consumer is obliged to indicate the reason for the rejection and bear the return expenses, and in return the supplier is obligated to deliver a new identical product, repair the defect, replace the product with another similar to it, cancel the order and return the amounts within 15 days without prejudice to the consumer's right to compensation (37).

However, we do not believe that this is considered a right to refrain from electronic acceptance, but this is a penalty for the supplier's breach of his obligations, especially since the legislator left the choice to the supplier and obligated the consumer to state the reasons, while the reversal known in comparative legislation is decided by the consumer of his own will without mentioning reasons, without being subjected to penalties and only obligated to pay the return expenses.

Therefore, the Algerian legislator did not regulate the right of reversal with special legal provisions in the Electronic Commerce Law, which although it raises a question about its fairness and about the damages that may be caused to the supplier as a result of the consumer's decline without reasons, but on the other hand, it achieves a kind of balance given the nature of electronic transactions and the lack of actual inspection of the product or service, as well as the impact of advertisements and advertisements on the will of the consumer.

From the above, the consumer's withdrawal from electronic acceptance is subject to the general rules of traditional consumer protection, i.e. the text of Article 19/2, 3 and 4 of Law No. 18/09 of 10/06/2018 amending and supplementing Law No. 09/03 on consumer protection and the suppression of fraud,(38) which states: «Revocation is the consumer's right to withdraw from the acquisition of a product without cause.

The consumer has the right to withdraw from the acquisition of a product within the framework of respect for the terms of the contract, and without paying additional expenses.

The conditions and modalities for the exercise of the right of revocation, as well as the deadlines and list of the products concerned, shall be determined by regulation." In this text, the legislator followed the European trend and comparative legislation in granting the consumer's right to withdraw acceptance without reason, but did not clarify its provisions regarding the modalities for the implementation of this right with regard to the duration, and referred this to the regulation, but it delayed the issuance of regulations.

What matters to us is that the legislator did not regulate the right of reversal in the Electronic Commerce Law, despite its great importance in this area, but referred to it without detail in the Consumer Protection Law, and therefore the same provisions apply to the electronic contractor as a consumer and he has the right to withdraw without reason, but this is within the list of products that will be determined by the regulation, that is, he is allowed to withdraw within the same conditions that apply to the traditional consumer, and the consumer does not have any provisions for electronic acceptance Especially in Algerian law.

#### **CONCLUSION:**

At the end of this research related to the privacy of the offer and acceptance in electronic contracts, it was found that standing on the intention of the parties to conclude the contract is an issue that represents a legal and technical challenge, requiring special attention because the ambiguity of the intentions of the parties to conclude the contract affects the conclusion of the contract and its validity, and this ambiguity may result from the privacy of the offer and acceptance in the digital environment where there is no personal interaction between the parties, and we have shown during the research how the digital environment affects the clarity of the expression of the offer or Acceptance in light of the multiplicity and diversity of electronic media used to express the will of the parties to the electronic contract, and we have reached a number of results represented in the following:

- The electronic offer, or what is called in Algerian legislation the electronic commercial offer, has characteristics that distinguish it from the traditional offer in that it is of an international nature that takes place remotely through electronic means, and its legal nature is determined by the method of presentation directed to persons.

- The ways to express electronic acceptance in the digital environment vary into several types, the most important and most widespread of which is the expression of acceptance via e-mail, by clicking on the admission icon on the website, through chat or direct viewing, as well as through remote downloading.

-Acceptance must be expressly expressed in electronic contracts, and the law does not consider implicit expression, and silence is not suitable for expressing acceptance in electronic contracting.

- In digital transactions, the reversal is concerned with special and exceptional provisions that are unusual in the general rules of traditional contracts, but the Algerian legislator did not keep pace with these provisions in the e-commerce law.


-As an answer to the problem posed, we have concluded that the privacy of the offer and acceptance in the digital environment inevitably affects the clarity of the intentions of the parties, especially in the absence of personal interaction that helps to express clearly and understand this expression through explanations and explanations that are provided in the case of personal interaction, and the multiplicity of electronic means may affect the clarity of the intention of the parties, especially when using symbols or phrases interpreted in a different way that may create a conflict or affect the direction of The will of the parties to contract or not.

Therefore, we propose to educate people and companies about the specificity of electronic contracting, express the will in the digital environment, and develop legal texts that regulate the modalities of drafting an offer and acceptance in order to achieve sufficient clarity that enhances understanding of the real direction of the will of the two parties, which contributes to building more trusting and secure electronic contractual relationships.

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