

EU ACQUIS ON E-COMMERCE

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Abstract

The discovery of a new form of communication between people, the Internet, was a premise of commerce development. The emergence of a new form of economic relation manifestation, e-commerce, led to important changes in the sphere of legal regulation. The need for these changes derives from the global and complex nature of the Internet.

Keywords: *e-commerce, Internet, computer crime.*

1. Conceptual delimitations

The advent of the Internet and the continuous development of information and communication technologies has led to a new type of trade, e-commerce, which is a separate entity with its own rules different from those of the traditional commerce.

The traditional commerce, based on written documents, rests on three pillars: promoting credit, speed of trade and security of trade, its legal certainty.¹

The electronic commerce meets all these demands of the traditional commerce, being the most dynamic sector of the electronic exchange of data and information system.

The term e-commerce came from the other side of the Atlantic, in a project of "Federal Electronic Commerce Acquisition Team" in 29th of April 1994. According to this project, the electronic commerce represents "the combined and optimal use of all available communication technologies to develop trade enterprise". It covers the exchange of computerized data, but also e-mails, in line databases, electronic payment transfer.

The electronic commerce, as seen by the Organization for Economic Cooperation and Development, represents doing business via the Internet and refers to all types of transactions related to trading activities, conducted at the firm level or other buyers and is based on the processing and transmission of information in digital form, including text, sound and images.

The European Commission defines e-commerce as trading activities done electronically. It comprises various activities including electronic trading of goods and services, network delivery of goods, electronic transfer of capital, electronic submission of dispatch sheets, direct marketing and warranty and post-warranty service. The electronic commerce involves both traditional activities in areas such as health,

education and new activities, such as virtual malls. It involves both products and services.

The Romanian doctrine defines e-commerce as "the entire use of electronic resources and technologies for trade and for other economic activities (meaning the use of electronic communication as a transmission medium throughout you can create, produce, advertise, catalog, inventory, purchase or sell goods, services and programs with economic value or that will adjust accounts)".²

A more comprehensive definition presents electronic commerce as consisting of all payments in which the transaction data are transmitted electronically, the person who pays and the person paid are directly involved in the transaction, and all the necessary information for authorizing for payment are exchanged electronically between the two sides.³

2. History of e-commerce

Although it is known that the emergence of e-commerce is linked to Internet development, in fact, first forms of electronic commerce have emerged much earlier, in the first half of the 20th century, when American Airlines has adopted a control system of sold, canceled and free seats at the flights that they provided. The first Home Banking system using the PCs was adopted in 1980 by First Interstate Bank, USA, and the first travel reservation system, easySABRE, was introduced in 1985 by Sabre Travel Network.⁴

Since the Internet can bring together people from different corners of the world, elaborating and adopting unitary rules at the international level regulating e-commerce is imperative. At the national level, it is necessary to adopt internal rules which are consistent with the global ones and that can adapt to the economic realities for each state.

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¹ Adrian Cristian Moise, *Metodologia infracțiunilor informatice săvârșite prin utilizarea frauduloasă a instrumentelor de plată electronică* (București: Ed. Universul Juridic, 2001), 277.

² Madalina Săuca, *Infracțiuni privind comerțul electronic* (Timișoara: Ed Mitron, 2005), 9.

³ Dan Vasilache, „Comerțul electronic, eComerț”, *Revista Română de Drept al Afacerilor* 1 (2005): 58.

⁴ Jacques Henno, *Internetul* (București: Ed. Prietenii Cartii, 2008), 100.

An important step towards adopting uniform regulations regarding the e-commerce is the European Agreement signed on 1st February 1993 in Brussels, which was ratified by Romania through Law no. 20/1993.

The variety of national legislation, which may lead to different regulations for similar situations, represents an obstacle to the development of electronic commerce. A solution to ensure international compatibility and consistency of legal norms is the UNCITRAL Model Law on Electronic Commerce, adopted in 1996. This law gives national legislators a set of internationally accepted rules for implementing electronic commerce. The Model Law contains 17 articles and is accompanied by a Guide to enactment.

A significant contribution to the development of e-commerce regulation comes from the International Chamber of Commerce in Paris which, in 1997, adopted the General Usage for International Digitally Ensured Commerce - GUIDEC.

In 1988, the European Commission launched TEDIS (Trade Electronic Data Interchange Systems) programme, aiming to develop an appropriate legal framework for the increased use of Electronic Data Interchange (EDI) in the Member States of the European Community.

The intensification of legislative activity in several Member States of the European Union has highlighted the need for a harmonized legal framework at the European level in order to prevent the national regulations to become an obstacle in the functioning of the Internal Market.⁵

According to Title XV of the Treaty on European Union, called Research and Technological Development, the European legislation for the program implementation consists of various directives, decisions, recommendations and communications⁶.

The most important directives of the European Parliament and of the Council on electronic commerce are Directive 1999/93/EC of 13 December 1999 on a Community framework for electronic signatures and Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

Another important legislative act is the Council Framework Decision 2001/413/JHA of 28 May 2001 on combating fraud and counterfeiting of non-cash means of payment.

In 2001 the Model Law on Electronic Signatures was adopted by the United Nations General Assembly Resolution no. 56/80. This law was adopted at the 37th session of UNCITRAL, held in Vienna from 18 to 29 September 2000. The Model Law on Electronic Signatures contains 12 articles and is accompanied, just like the UNCITRAL Model Law on Electronic Commerce, by a guide to enactment.

In Romania, online trade started in 2004, much later than in Western countries. For this reason, online trade has grown more slowly in our country compared to countries like the UK where over 80% of all purchases are made online. This form of trading is on an upward trend in Romania, even if its growth is slower than the online trade of other European countries. Romania, compared to other countries with a long tradition in computer science, does not have a historical institutional tradition. The first steps in this direction were made by the National Institute for Research and Development in Informatics.

3. The European legal framework on e-commerce

The electronic commerce is an important source of revenue for providers opting for an electronic market. Therefore, in order to develop its huge potential in a safe environment in which all participants have confidence, certain standards and regulations ought to be imposed.

The legal framework for trade, which traditionally relies on procedures and requirements tailored for documents on paper, is adapting to new technologies. Electronic commerce is a separation of the traditional trade based on documents.⁷

According to the provisions of Title XIX of the Treaty on the Functioning of the European Union, called Research and technological development and space, European legislation consists of secondary legislation such as directives, decisions, opinions and recommendations, as well as complementary measures, such as communications.

EU *acquis* consists of common rights and obligations applicable to all Member States. EU *acquis* covers all the legal rules governing the work of EU institutions, actions and policies, consisting in⁸:

- the content, the principles and the political objectives contained in the original Treaties of the European Communities (Treaty establishing the European Coal and Steel Community, the Treaty establishing the European Economic Community and the Treaty establishing the European Atomic Energy Community) and in the subsequent Treaties (Single European Act, the Maastricht Treaty, the Treaty of Amsterdam, the Treaty of Nice, the Treaty of Lisbon);
- the legislation adopted by the EU institutions to implement the provisions of the Treaties (regulations, directives, decisions, opinions and recommendations);
- the jurisprudence of the Court of Justice of the European Union;
- declarations and resolutions adopted within the European Union;
- joint actions, common positions, conventions,

⁵ Ioan Schiau, „Cadru juridic al comerțului electronic”, *Revista de drept comercial* 1 (2002): 56-72.

⁶ Carmen Todica, *Statutul juridic și puterile administratorului în societatea comercială* (București: Ed. Universul juridic, 2011), 18.

⁷ Schiau, „Cadru juridic al comerțului electronic”: 56-72.

⁸ Zoltán Horváth, *Manuel sur l'Union Européenne* (Assemblée nationale hongroise, deuxième édition en français, 2007), 231.

resolutions, declarations and other acts adopted by the Common Foreign and Security Policy (CFSP) and in Cooperation in the field of Justice and Home Affairs (JHA);

- international agreements in which the European Union is a party, and those signed between the Member States of the European Union with regard to its work.

The most important directives of the European Parliament and of the Council on electronic commerce are Directive 1999/93/EC of 13 December 1999 on a Community framework for electronic signatures and Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

The aim of the Directive 1999/93/EC stated in its first article is to make electronic signatures easier to use and help them become legally recognized within the Member States. This Directive establishes the legal framework for electronic signatures and certification services at European level in order to ensure the proper functioning of the internal market of the Community. The Directive aims to build confidence in the process of certification of the origin and integrity of electronic messages in IT era.

The Electronic Signature Directive does not cover those aspects relevant to the formation and validity of contracts or other legal obligations, when there are certain legal requirements, national or European, regarding the form of the act. It also does not affect rules and limitations prescribed in national or European legislation for the use of documents.

The Directive 1999/93/EC defines the conditions applicable to the use of electronic signatures, reaffirms the principles of the Internal Market, establishes the legal effects of electronic signatures and the security measures to protect the electronic information.

The Directive 2000/31/EC on electronic commerce contributes to the proper functioning of the electronic commerce in the Internal Market, ensuring the free movement of information society services between Member States. This Directive establishes the framework for the national legislation regarding the information services for the Internal Market, it establishes the conditions for setting up the certification bodies and it regulates the commercial transmissions and the electronic contracts, the liability of intermediaries, the rules of conduct applicable, the judicial and extra-judicial settlement of disputes, as well as the cooperation between Member States.

The Directive also defines "the coordinated field" as the requirements contained in the Member States legislation, applicable to the information society services and that the providers of such services must comply. These requirements may relate to professional qualifications, authorization or notification of the

information service provider, his behavior, quality of services and liability of service provider.

Directive 2000/31/EC defines the principles governing the information society services provided in the Internal Market⁹:

- The principle of free access to information: Member States cannot, on matters falling within the coordinated field, restrict the freedom to provide information;

- The principle of excluding prior authorization: Member States shall take the necessary measures so that the set up and the continuation of the activity of IT service provider shall not be subject to any prior authorization or other conditions having equivalent effect;

- Member States shall impose on service providers the obligation to facilitate the free, simple and direct access of service users to information that identifies the supplier and its authorization, when the law stipulates the necessity of an authorization;

- Member States shall ensure that any commercial communication which is an information society service will identify the commercial nature of communication and the conditions which must be met in order to participate in any promotional offer;

- Member States shall ensure that legal regulations applicable to the process of forming and to the execution of the contracts do not create obstacles for the use of electronic contracts and do not to lack these contracts of their legal effects motivated by the fact that they were created by electronic means;

- The principle of "simple behavior": Member States shall ensure that the service provider is not held responsible for the information transmitted, as long as the provider does not interfere with the electronic message.

Another important normative act at EU level in the field of electronic commerce is the Council Framework Decision 2001/413/JHA of 28 May 2001 on combating fraud and counterfeiting of non-cash means of payment. This Framework Decision defines the specific facts of fraud involving the use of other means of payment than liquidity. Under this framework decision, fraud involving any form of non-cash means of payment will be recognized as a criminal offence and should be incriminated in all Member States, regardless of the person who committed it, natural or legal person, and should be punished by effective, proportionate and dissuasive penalties, without necessarily involving deprivation of liberty, except in the most serious cases.¹⁰ The framework decision lists the various types of behavior that should be incriminated and also establishes a series of criteria to determine the jurisdiction of the national judicial authorities in respect of the offences referred to in the framework decision.¹¹

⁹ Schiau, „Cadru juridic al comerțului electronic”: 56-72.

¹⁰ Adrian-Milutin Truichici, *Lupta împotriva fraudei și falsificării mijloacelor de plată, altele decât lichiditățile la nivelul Uniunii. Europene*, Revista de drept comercial 2 (2008): 8.

¹¹ Moise, *Metodologia infracțiunilor informatice*, 277.

The decisions of the European Parliament and those of the Council, the communications from the Commission to the Council and to the European Parliament and the Commission's recommendations are enforcement instruments for the existing directives.

In conclusion, the characteristic of EU regulation is that the directives, the decisions, the recommendations and the communications do not replace the existing regulations in Member States on electronic commerce, but aim to harmonize these national legislations in order to attain international compatibility and development of electronic commerce in the information society.

4. The implementation of European rules on e-commerce in Romania

In the context of the emergence and the development of electronic commerce, the Romanian society has suffered social, economic and legal transformations. From a legal perspective, Romania has adopted regulations that have outlined a legal framework for the sustainable development of electronic commerce, regulations consistent with international obligations.

In this respect, Law no. 20/1993 ratifying the European Agreement of 1 February 1993 in Brussels must be mentioned.

Among the objectives set by Romania with the European Union are:

- promoting and developing trade, as well as harmonious economic relations between the parties;
- providing a basis for economic, social, financial and cultural cooperation;
- supporting the efforts of our country's economic development;
- providing a framework for the gradual integration into the European Union.

Romania has complied with the obligations and, therefore, began creating a framework composed of a series of regulations governing every component of this complex system of transactions, the electronic commerce.

In this regard, the provisions of Law no. 365/2002 on electronic commerce, as amended, are applicable. This law transposes Directive no. 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain aspects of information society services, in particular electronic commerce, in the Internal Market. This normative act is "the common law" in the field. The concept of e-commerce, although known before 2000, it wasn't enacted in Romania until the emergence of e-commerce law.

The main normative act subordinated to the Law no. 365/2002 consists of the Methodological Norms approved by Government decision no. 1308/2002.

The electronic commerce is based on the electronic signature regulated by Law no. 455/2001

and by accepted standards for data transmission security and data storage. This law transposes Directive 1999/93/EC of 13 December 1999 on a Community framework for electronic signatures.

Article 2 of Law no. 455/2001 states that the provisions of this law "shall be supplemented with the provisions concerning the conclusion, validity and effects of legal acts", art. 2 para. (3) of Law no. 365/2002 states that the provisions of this law shall be supplemented with tax laws, the laws governing the protection of individuals with regard to the processing of personal data and privacy in the telecommunications sector and the legal provisions on competition and par. (5) of the same article states that "if it does not contain derogations, this law is supplemented by legal provisions on the conclusion, validity and effects of legal acts, with other legal provisions that are intended to protect consumers and public health, as well as legal provisions regarding the regulation of private international law".

The Law no. 455/2001 establishes the legal regime of electronic signatures and of the documents in electronic form, as well as the conditions for providing the certification of electronic signatures, according to art. 1, and the Law. 365/2002 aims to establish the conditions for providing the information society services, as well as to incriminate as crimes the facts committed in connection with the domains security used in e-commerce, the issuing and the use of electronic payment instruments and the use of identification data in order to perform financial operations, providing a framework for supporting the free movement and safe development of these services.

The first steps in lawmaking in this area, in accordance with the international legal framework, were made by adopting G.O no. 130/2000 on the legal regime of distance contracts, followed by Law no. 455/2001 on electronic signature, together with G.D no. 1253/2001 on the approval of Technical and methodological rules on electronic signature law enforcement, then G.O no. 20/2002 on public procurement through electronic auctions and G.O no. 24/2002 regarding the receipt by electronic means of local taxes, Law no. 51/2003 approving G.O no. 130/2000 on the legal regime of distance contracts, G.D no. 181/2002 on the establishment of the General Inspectorate for Communications and Information Technology and G.D no. 182/2002 on the list of competent authorities that are obliged to use electronic procurement auction. The legal framework was completed by the electronic commerce Law no. 365/2002.

The internal regulations that build this legal framework are transposing the EU legislation. Many other laws are governing specific aspects of electronic commerce, for example:

- National Bank of Romania Regulation no. 4/2002 concerning transactions through electronic payment instruments and the relations between the parties to such transactions;

- Order of the Minister of Communications and Information Technology no. 16/2003 on the procedure for approval of payment instruments with remote access, such as Internet banking or home-banking applications;

- Title III of Law no. 161/2003 on certain measures to ensure transparency in exercising public dignities, public functions and in business, to prevent and to punish corruption, which aims to prevent and to combat cybercrime and which contains provisions related to crimes and offenses, procedural provisions and aspects regarding international cooperation in combating the phenomenon of cybercrime;

- Law no. 250/2003 approving Government Emergency Ordinance no. 193/2002 concerning the introduction of modern payment systems;

- O.G. no. 73/2003 amending and supplementing O.G. no. 20/2002 on public procurement through electronic auctions;

- Law no. 485/2003 amending and supplementing the Banking Law no. 58/1998;

- Norms for the application of G.O no. 20/2002 on public procurement through electronic auctions.

In conclusion, in the light of the economic integration into the European Union, it was necessary

for Romania to harmonize its national legislation with the European legislation. After the accession, the EU law was automatically integrated into the national law. As regards to the alignment with EU rules on electronic commerce, Romania has adopted a set of laws transposing EU provisions, acts summarized in the section above.

5. Conclusions

In conclusion, I believe that the regulation in the EU of the Internet in general and of the electronic commerce in particular, remains a mosaic of laws, rules, standards and different practices. This situation hinders the development of online services and undermines the confidence of actual or potential users, both in terms of demand and supply. The ignorance of the rights and of the applicable rules, as well as the opportunities offered by the digital economy, increases people's reluctance. The practical difficulties related to cross-border transactions (payments, shipping, dispute settlement, risk of abuse) discourage them to take full advantage of the Internet to purchase or supply goods and services.

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