

Chapter 26

E-commerce

1. General

Romania has adopted a set of regulations on e-commerce, relying on the European Union regulations existing in this field. To this effect, the following main directives were considered:

- EU Directive no. 97/7 on consumers' protection in distance contracts;
- EU Directive no. 99/93 on electronic signatures;
- EU Directive no. 2000/31 on E-commerce.

2. Main Regulations

- Law no. 365/2002 on E-commerce ("Law no. 365/2002"), amended and republished on November 29, 2006;
- Government Ordinance no.130/2000, on distance contracts ("G.O. no. 130/2000"), amended and republished on March 7, 2008;
- Law no. 455/2001 on electronic signature ("Law no. 455/2001").

3. Information society services. Principles of providing information society services

3.1. General

The law defines the information society service as any provision of services, or which involves the establishment, modification, transfer or set-off of a property right over tangible or intangible assets, made by electronic means and which has the following characteristics:

- (i) it is made in consideration of a economic benefit, usually procured to the provider of the offer by the recipient;
- (ii) it is not necessary for the provider of the offer and for the recipient of the offer to be physically present simultaneously at the same place;
- (iii) it is presented to the recipient by transmitting the information upon the recipient's individual request.

3.2. Information services supply rules

Following EU regulations in the field, the Romanian legislation establishes the principles for the supply of information society services, in article 4 of the Law no.365/2002, as follows:

- (i) the provision of services is not subject to any prior authorization. However, this principle will not affect the legal provisions imposing prior authorization of activities carried out by individuals or legal entities, if such provisions do not expressly and exclusively aim at the information society services or at service providers;
- (ii) the provision of services is governed by the free and fair competition principles;
- (iii) establishing of a services supplier in a certain country is not necessarily conditioned on the place where the technical and technological means required for such supply of services are located;
- (iv) the information society services providers, established in the EU member states, will provide information society services in accordance with the European Agreement instituting an association between Romania, on the one hand, and the European Communities and their member states, on the other hand;
- (v) the information society services providers established in other states will provide information society services based on the bilateral agreements entered between Romania and such states;
- (vi) the legislation in the e-commerce sector is completed by the legal provisions regarding the execution, validity and effects of legal acts, with other legal provisions aiming at the consumer and public health protection, as well as any other legal provisions concerning private international law relations.

4. Transmitting information on information society service providers

The prerequisites specific to consumer protection oblige the information society services providers to ensure their recipients and public authorities the access to information regarding the providers' legal status and the type of services they provide. Such information is independent of any subsequent contracts conclusion by electronic means between the service providers and their addressees. This kind of information must be visibly, clearly and permanently shown on the Web page promoting such services.

Such information mainly refers to:

- (i) the provider's name;
- (ii) the provider's residence or head offices;

- (iii) telephone and fax number, mail address and any other data necessary to contact the services provider directly and effectively;
- (iv) the registration number and other similar identification means, if the services provider is registered with the Trade Register Office or other similar public register.

5. Commercial communication by e-mail

Any sort of commercial communications via e-mail is forbidden, save for cases when the recipient expressly agreed on receiving such e-mail communications, according to article 6 of Law no. 365/2002.

If the prior agreement for receiving commercial communications exists, such communications should observe the following requirements:

- (i) be clearly identifiable as such;
- (ii) the individual or legal entity on whose behalf such communications are made should be clearly identified;
- (iii) promotional offers, such as discounts, prizes and gifts, should be clearly identifiable and the conditions to meet in order to obtain such discounts, prizes and gifts should be easily accessible and clearly presented;
- (iv) competitions and promotional games must be clearly identifiable and the participation conditions should be easily accessible and clearly presented;
- (v) any other conditions imposed by the legal provisions in force.

6. Contract conclusion through electronic means

According to the law, the electronic means are electronic equipment and cable, optical fiber, radio or satellite networks, or other similar means used in processing, storing or transmitting information. The conclusion of contracts by such means has to be preceded by the offeror's duty to provide the recipient with all technical information needed for the proper conclusion of the contract.

As for the contract conclusion through electronic means, unless the parties agreed otherwise, the contract will be considered concluded as of the moment when the acceptance, by the recipient, of the offer to contract reaches the offeror.

Similarly, the contract, which by its nature implies an immediately execution of a particular service, will be considered as concluded the moment the debtor starts performing its contractual obligations.

7. Service provider's obligations

7.1. General

The services providers are subject to civil, criminal and administrative liability, unless otherwise provided by law, and they are responsible for the information supplied by themselves or on their own account.

The services providers will not be responsible for the information transmitted, stored or which they enable access to.

Intermediation by simple transmission means the transmission within a communication network of the information supplied by a service addressee, or ensuring access to a communication network.

According to the law, the services provider will not be held liable for the information transmitted, if the following conditions are cumulatively met:

- (i) the transmission was not initiated by the services provider;
- (ii) the information receiver was chosen by someone else than the service provider;
- (iii) the contents of the transmitted message was not influenced by the services supplier.

The law also introduces two new specific information technology concepts, that are related to providers' liability, namely caching storage and hosting storage.

7.2. Caching storage

Caching storage is an automatic, transitory and temporary storage of the transmitted information, as far as this operation takes place exclusively to make the information transmission more efficient.

The services provider will not be held liable for the information transmission under such terms, if:

- (i) it does not distort the transmitted information;
- (ii) it observes the legal rules concerning access to that information;
- (iii) it observes the rules or the customs regarding information updating, similarly to the way they are used in industry;
- (iv) it does not prevent any person to legally use commonly known technologies applied in the industry, in order to obtain data about the nature or the use of the information;
- (v) it expeditiously acts to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

7.3. Hosting storage

Hosting storage means permanent storage of the information by a services provider, upon the recipient of services request.

In hosting storage, the services provider is not legally liable if:

- (i) the services provider has no information about the stored activity or information being illegal, and is not aware of any facts or circumstances proving that such information may damage third parties' rights;
- (ii) if the services provider is aware of issues under a) above, the services provider has taken immediate steps to eliminate or to block access to such activities or information.

The above-mentioned cases are not applicable if the services receiver acts under the authority or the control of that particular services provider.

8. Distance contracts

The law defines distance contracts as contracts for services or products supply, concluded between a commercial offeror and a consumer, within the framework of a selling system organized by the offeror who exclusively uses, before and after the conclusion of such a contract, one or several long distance communication means.

Before concluding a long distance contract, the offeror must clearly communicate the consumer information on:

- (i) offeror's identity and, in case the contract provides for anticipated payment, his address and contact details, the telephone / fax, e-mail and sole registration code;
- (ii) main features of product or service;
- (iii) retail price of product or service and applicable charges or commissions;
- (iv) terms of payment, delivery or service provision;
- (v) the consumer's right to unilaterally terminate the contract, except for cases stipulated by the law;
- (vi) the offer or price validity period;
- (vii) the deadline for the contractual obligations performance.

At the same time, the offeror must provide the consumer with the following «*essential information*» on a durable information support, before or simultaneously with the contract execution:

- (i) confirmation of the above mentioned information unless it was transmitted before the contract conclusion;
- (ii) terms and ways to exercise the unilateral termination right, comprised in the following clause: «*The consumer will have the right to send a written notification to the offeror, informing about his purchase waiver, with no penalties involved and no obligation to ground its decision, within 10 working days from the date the product is received or, in case of services supply contracts, within 10 working days from the contract execution*». This clause must be written in bold letters. Failure to observe this term will result in the consumer being freed from any payment / compensation obligations;
- (iii) the head office address, tel/fax, as well as the e-mail address of the offeror to whom the consumer could address his claims;
- (iv) information regarding post selling services and the guarantees offered;
- (v) terms for unilateral termination of the contract in case of unlimited duration contracts or in case of contracts concluded for over one-year periods.

Distance contracts are considered as validly concluded the moment the consumer receives from the offeror a message confirming his order.

9. Unilateral termination of distance contracts

The consumer is entitled to terminate a distance contract unilaterally, within 10 working days, with no penalties involved and with no obligation to ground its decision. Only direct expenses incurred with sending back the product may be charged to the consumer.

The 10-day term starts running differently, as follows:

- (i) for products, on the date of their receipt by the consumer, if all the informative obligations were met;
- (ii) for services, on the date of the contract conclusion or after its conclusion, on the date the informative obligations were met, but no later than 90 days.

If the offeror fails to transmit the consumer the essential information, the term for the contract unilateral termination is 90 days, and will start as follows:

- (i) for products, on the date of their receipt by the consumer;
- (ii) for services, on the date of the contract conclusion.

If, during the 90-day period, the essential information reaches the consumer, the 10 working day period for unilateral termination will start running as of that moment.

Unless the parties agreed otherwise, the consumer may not unilaterally terminate the distance contract, in the following cases:

- (i) for service provision contracts already in progress, with the consumer's consent and within the above mentioned 10-working day period;
- (ii) for services or product supply contracts the price does not depend on the offeror, but on the fluctuations on the financial markets;
- (iii) for contracts regarding products manufactured according to the consumer's specifications or which specially personalized, as well as regarding products which, by their nature, cannot be returned or can rapidly deteriorate;
- (iv) for contracts regarding the supply of audio, video and software, if they have been un-wrapped by the consumer;
- (v) for contracts regarding the supply of newspapers and magazines;
- (vi) for betting and lottery contracts.

10. Legal regime of electronic deeds

According to Law no.455/2001, any electronic deeds that were logically incorporated or associated an extended electronic signature, based on a qualified valid certificate, and generated by means of a secured device for electronic signature creation, will be assimilated in terms of effects and conditions, to a deed bearing a private signature.

An electronic deed that was logically incorporated, accompanied or associated an electronic signature and that is acknowledged by the person it is opposed to, will have the same effects as an authentic document between its signatories and the persons representing their rights.

In such cases where, according to the law, the written form is required for proof or validity purposes, an electronic document may meet this requirement if it was logically embodied, attached or associated an extended electronic signature, based on a qualified certificate and generated by means of a signature creation secured device.

If one of the parties contests the deed or the signature, the court will order a technical expertise. To this end, the expert or specialist must require qualified certificates, as well as any other documents necessary under the law, in order to identify the document's author, the signatory or certificate beneficiary.

11. Electronic signature certification services

11.1. General

Certification services may be provided by any Romanian or foreign entity, and consist in the issuance of certificates or other e-signature related services.

Certification services are not subject to any prior authorization, and the certification services provider is bound to notify the specialized supervision and regulatory authority, 30 days prior to beginning its activity, and to submit to such authority complete information regarding the safety procedures and the certificates used within its activity. However, providers of qualified certification services may request, before providing the service, to be subject to an audit performed by an auditor appointed by the regulatory authority.

At the same time, the certification services provider must take all the necessary steps to inform the user on the correct use of the certification system and the system, on its operation procedure, on the fees levied or dispute settlement means, etc.

Certification services providers are bound to create and keep records of the certificates issued, and such records must include the following data:

- (i) the exact date and time of the certificate issuance;
- (ii) the exact date and time of the certificate expiry;
- (iii) the exact date and hour of the certificate suspension or revocation, including grounds for such certificate suspension or revocation.

The records should be permanently available for scanning/ reading, also on-line.

11.2. Qualified certification services

Qualified certificates basically include:

- (i) the indication of its issuance as qualified certificate;
- (ii) the identification data of the certification services provider, its citizenship or nationality;
- (iii) signatory's name or surname, and other identification details of the signatory, if relevant;
- (iv) beginning and end of the certificate validity period;
- (v) identification code of the qualified certificate;
- (vi) the extended electronic signature of the qualification certificate provider that issued the certificate.

The certification services providers have the obligation to suspend or revoke a certificate, as the case may be, within 24 hours from the occurrence of any of the following events:

- (i) the signatory's request;
- (ii) as a result of a legal provision;
- (iii) if data in the certificate is no longer accurate or true;

- (iv) signatory's death or putting under an interdiction;
- (v) the information based on which the certificate was issued proves to be false;
- (vi) signature creation data confidentiality was violated;
- (vii) fraudulent use of the certificates.

The certificate suspension or revocation becomes ostensible to third parties on the date of its registration with the electronic certificate records.

The services provider may terminate his activity further to its dissolution or voluntary legal liquidation, bankruptcy, or any other similar cause.

12. Evolution of E-commerce law

Apart from the above synthesized regulatory framework, even though electronic commerce continuously expands from a strict business perspective, E-commerce law in Romania is, however, not yet influenced by complex and comprehensive self-regulatory schemes employed by services providers communities, nor has case law a relevant contribution to its development.

Nevertheless, in the past years, international renowned electronic service providers tend more and more to carefully focus on Romanian E-commerce legislation when adapting their legal terms and conditions for providing services to Romanian consumers. Such legal approaches may well induce a stimulating effect on Romanian service providers, making them more connected to self-regulation and codes of conduct, thus modeling their business terms and conditions to legal approaches which are common on an international level.