WORLD ONLINE BUSINESS LAW

Andrew F. Simpson
and
N. Stephan Kinsella
General Editors

ROMANIA

by
Catalin Baiculescu, Partner
Horatiu Dumitru. Ph.D.. Senior Associate

Musat & Asociatii 43 Aviatorilor Blvd., 1st District, Code 011853,
Bucharest, ROMANIA
Tel: (40+21) 223 3717
Fax: (40-21) 223 3957; 223 0495
Email: general@musat.ro
Website: www.musat.ro

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ONLINE BUSINESS IN ROMANIA

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I.

THE LEGAL FRAMEWORK

A. SOURCES OF LAW

1. Introduction

The Romanian legal system is part of the Roman law family. It is French influenced, being built on the foundations of the French Civil Code of 1804. The Romanian Civil Code entered into force in 1864.

2. Constitution

Romania is a Republic. The Constitution, approved in 1991 and further amended in 2003, is the fundamental law of the Romanian legislation. It sets forth citizens' basic rights and liberties, as well as the system of public authorities.

a. System of public authorities

The Parliament, consisting of the Chamber of Deputies and the Senate, is the supreme representative body of the Romanian people and the sole legislative authority of the State. The Chamber of Deputies and the Senate are elected for a term of office of four years. The Parliament has the power to grant confidence to the Government, based on the latter's program, and to withdraw confidence, by carrying a motion of censure.

The Executive consists of two institutions: the President of Romania and the Government. The President of Romania is the representative of the Romanian State, having the power to safeguard the national independence, unity and territorial integrity of the country. The President of Romania is responsible for guarding the observance of the Constitution and the proper functioning of public authorities. To this effect, he is acting as a mediator between the Powers in the State, as well as between the State and society. The President of Romania is elected by universal, equal, direct, secret and free suffrage, for a term of office of four years. The major powers of the President of Romania are:

- appointment of the Government, based on the vote of confidence granted by the Parliament;
- consultation of the Government in major political issues;
- attending Government meetings, at his or her request;

- dissolution of Parliament;
- concluding international treaties in the name of Romania;
- commander-in-Chief of the Armed Forces and Head of the Supreme Council of National Defense; and
- appointment of judges.

The Government (the Cabinet) is the public authority that, in accordance with its government program accepted by the Parliament, ensures the implementation of the domestic and foreign policy of the country, exercising also the general management of the entire public administration. The Government is headed by the Prime Minister, appointed for Cabinet formation by the President of Romania. The Prime Minister has the duty to direct Government actions and to co-ordinate the activities of its members.

The Judicial Authority consists of the courts of law, the Public Ministry and the Superior Council of Magistracy. The courts system is made up of the Supreme Court of Justice, Courts of Appeal, Tribunals and Town Courts, in descending order of importance.

Town Courts have general powers for civil and criminal matters. For some specific matters, Tribunals located in each of the 41 districts of Romania have the power to judge in the first instance. Tribunals are also competent to hear appeals filed against decisions of Town Courts. Appeals brought against Tribunals' decisions have to be judged by Court of Appeals. There are 15 regional Courts of Appeal, having jurisdiction over one, two or even three Tribunals.

The Supreme Court of Justice hears second appeals against lower courts' decisions. It also gives opinions in so-called interest of law appeals filed by the Ministry of Justice, in order to settle a uniform case law in certain legal matters handled by lower courts in different ways.

The Public Ministry is the judicial body comprising prosecutors and its main duty is to represent the legal interests of society and to defend legal order, as well as citizens' rights and liberties.

The Superior Council of the Magistracy nominates judges for appointment by the President of Romania and acts also as a disciplinary council for judges.

Besides the bodies which form the Legislative, Executive and Judicial branches, the Constitution also empowers the following public authorities:

- the Constitutional Court, mainly in charge of adjudication on the constitutionality of Laws and Government Ordinances;
- the Court of Audit, acting as an oversight body in relation to the formation, administration and use of financial resources of the State and the public sector; and
- the Ombudsman, responsible for defending citizens' rights and liberties.

b. The legal system

According to the Constitution, primary legislation consists of Laws adopted by the Parliament and Ordinances issued by the Government under certain circumstances. Primary legislation is meant to develop, to implement and to apply constitutional provisions. Consequently, primary legislation provisions cannot be contrary to the Constitution.

Secondary legislation comprises Government Decisions and regulations issued by administrative bodies, according to specific powers set forth within Acts of primary legislation, in order to organize and implement provisions of Laws and Government Ordinances. Accordingly, provisions of secondary legislation cannot be contrary to Laws or Government Ordinances.

The Constitution further provides that, subsequent to Romania's accession to the European Union, the provisions of the constitutive treaties of the European Union, as well as all the other mandatory community regulations, shall prevail when conflicting with contrary provisions of the internal legal framework, taking also into account the provisions of Romania's accession treaty.

4. Laws

Article 73 of the Romanian Constitution states that the Parliament adopt constitutional, organic and ordinary laws. Constitutional laws are those by which the Constitution is amended. Organic laws regulate essential areas such as:

a) the election system;

b) the establishment of political parties;

c) organization of the Government and the Supreme Council of National Defense;

d) crimes and punishment regime;

e) the status of public servants; and

f) the general legal property regime.

Organic laws are passed by the majority vote of each Chamber of the Parliament, while ordinary laws may pass by the majority vote of the members present in each Chamber. The legislative initiative belongs to the Government, as well as to the members of the Parliament. After they are passed within the Parliament, the laws are submitted to the President of Romania, in order to be promulgated. Before promulgation, the President of Romania may return the law to Parliament for reconsideration, thought the President may do so only once. After promulgation, laws must be published in the Official Gazette of Romania and will come into force on the day of publication or the date provided within their text.

5. Ordinances

According to Article 115 of the Constitution, Parliament may pass a special law enabling the Government to issue ordinances in areas outside the scope of organic

laws. To the extent of such delegation, the ordinance issued by the Government has the same legal effect as a law, upon being published in the Official Gazette of Romania, However, if the enabling law requires it, the ordinances shall be submitted to the Parliament for subsequent approval. In this respect, Parliament may approve, amend or reject the ordinance.

In exceptional circumstances, the Government may adopt emergency ordinances, which shall come into force only after their submission to Parliament for approval. The areas in which emergency ordinances may be issued include those within the scope of organic laws. However, emergency ordinances cannot be issued in the field of constitutional laws by which the Constitution is amended, they cannot affect the fundamental institutions of the State, the constitutional rights and freedoms or the electoral laws, and they cannot be used to take assets into public property.

4. Government Decisions

Government Decisions are regulations passed in order to implement laws and ordinances. They are subject to publication in the Official Gazette of Romania.

B. SCHEME OF ONLINE BUSINESS REGULATION

1. Introduction

In Romania, online business has been regulated in a comprehensive and uniform manner, covering the main legal aspects that are essential for this area. The relevant legislation on electronic commerce is represented by the following acts:

• Law no. 365/2002 electronic commerce, as further amended (the **"Law no. 365/2002");**

• Government Ordinance no. 130/2000 on the legal regime of distance contracting (the **"GO no. 130/2000");**

• Law no. 455/2001 on electronic signatures (the **"Law no. 455/2001");**

• Law no. 506/2004 on the processing of personal data and the protection of private life in the communication sector (the **"Law no. 676/2001");**

• Law no. 677/2001 for the protection of persons with respect to the processing of personal data and the free circulation of these data (the **"Law no. 677/2001");**

• Emergency Government Ordinance no. 79/2002 on the general legal framework on communications (the **"EGO no. 79/2002");** and

• Law no. 161/2003 Title HI regarding the prevention and fighting of cybercrime (the **"Law no. 161/2003").**

2. Scope of basic electronic commerce regulations

a. Electronic commerce

Law no. 365/2002 provides the main framework regulating online commerce. The scope of Law no. 365/2002 consists of:

- the establishment of conditions for providing information society services;
- the legal regime of contracts concluded by electronic means;
- the legal regime of service providers' liability;
- the oversight and control of compliance with legal provisions; and
- the regime of offences and crimes regime, in case of disregarding the provisions of the law.

According to Article 1 of the Law no. 365/2002, an information society service means any service rendered by electronic means, having the following features:

(i) it is performed in consideration of a benefit, granted to the offeror by the recipient;

(ii) it is not necessary for the offeror and recipient to be both physically present in the same place; and

(iii) it is made by sending the information at the individual request of the recipient.

The Law no. 365/2002 establishes the main duties of service providers. In this respect, they must make available, to recipients and public authorities, their identification data and tariffs for the services they provide. The service provider must also inform users of the technical procedure for contract conclusion, on the relevant codes of conduct to which the service provider subscribes, as well as of technical means for identification and correction of possible errors.

b. Distance contracting

Basically, **GO no. 130/2000** regulates the conditions for execution and performance of contracts concluded at a distance between traders providing products and services, on one side, and consumers, on the other side. For distance contracting on capital markets, a different piece of legislation is applicable.[1]

c. Electronic signatures

Law no. 455/2001 regulates the legal regime of electronic signature and of electronic documents.

"Electronic signature" means a set of data in electronic form, created through software and/or hardware devices, which are used as an identification method.

1 See Chapter II, Section J.3.1.

The document bearing an electronic signature recognized by the person to whom it is addressed, has the same legal effects as an authentic document. Electronic signatures are certified by specialized suppliers of services, which carry out their activity under the control of a national authority.

d. General legal framework on communications

Performing electronic commerce and online business requires the existence of an infrastructure that is capable of meeting the expectations of consumers, as well as promoting and constantly developing business. Such infrastructure is made of electronic communications networks and services.

EGO no. 79/2002 regulates the basic activities related to electronic communications networks and services, in particular with respect to oversight and competition.

According to this legislation, rendering electronic communications networks and services is free, under the general authorization regime. However, any person who intends to provide such networks and services register, by notifying the regulatory authority. A person who made such notification is authorized to provide those types of networks and services which have been mentioned in the notification, having specific rights and duties. Any changes that might occur in time in the original notification must be re-notified to the regulatory authority,

e. Public procurement

The Emergency Government Ordinance no. 34/2007 **("EGO no. 34/2007")** has established a comprehensive legal framework regarding public procurement. A considerable part of this primary regulation concerns procurement operations performed by electronic means, more precisely, through electronic auctions. According to the definition provided by EGO no. 34/2007, an electronic auction is the repetitive process initiated after a preliminary complete evaluation of offers, by which the bidders enjoy the possibility, using only electronic means, to decrease the prices or to improve other elements of their offer. The final evaluation of offers shall be made automatically by specific electronic means. The key device for such procurements is the Electronic Public Procurement System.

II.

KEY ISSUES IN ONLINE BUSINESS REGULATION

A. SETTING UP AND FUNDING A TECHNOLOGY BUSINESS

1. Incorporation

Law no. 31/1990 regarding Trading Companies is the statute providing for incorporation of a business in Romania, as well as for die entire functioning system of trading companies. The most popular forms of incorporation are the Joint Stock Company and the Limited Liability Company. Other forms of incorporation, such as the Partnership Company, are quite seldom seen, and they fit mainly to small businesses.

The incorporation process involves the company's registration at the Trade Registry, following an authorization issued by the Trade Registry Judge and particular approvals, namely the permit for fire extinction, the sanitary veterinary authorization, the environmental permit and the labor protection authorization.

According to Article 4 par. 1 of the Law no. 365/2002 regarding electronic commerce republished, information society services may be provided without any prior specific authorization. Consequently, except for the particular approvals mentioned above, which are needed for the proper incorporation of a business, no specific approvals are required in relation to the provision of electronic commerce services.

2. Funding

The law does not provide any special terms with respect to funding technology-based businesses. Consequently, the persons who are planning to incorporate such business must comply with the standard legal provisions regarding share capital contributions.

3. Domain Name Registration

In Romania, the legal authority entitled to register domain names (Romanian Top Level Domain—ROTLD) is the National Institute for Research and Development in Informatics (www.rnc.ro). Registration may be carried out online, according to certain rules which can be accessed at <www.rotld.ro>,

The following procedure has to be followed:

• Requests for domain name registration within the .ro domain and its sub-domains (such as **org.ro, info.ro, com.ro, store.ro**) will be handled by a robot. This robot performs a check of the list of already existing domain names.

• Applications for new domain name registration, as well as for contact data modifications for existing domain names are sent only by e-mail to domain-admin@rnc.ro or by WEB form available at <www.rotld.ro>.

• E-mail notifications are sent automatically by the robot to inform the applicant whether its application has been accepted or rejected. It is essential to specify an operational e-mail address at the requester's e-mail in the application form.

Names within the .ro domain and its sub-domains may be registered for active usage (domain delegation) or for inactive usage (reserved domain names). Any legal entity and any individual may register domain names, independent of the location of those legal entities and individuals. The administrative contact mentioned in the application form is responsible for a domain and is therefore required to be an employee of the legal entity which will be the owner of the domain name. The languages for communication with the registrants and registrars are Romanian or English. The registration fee is USD $61.00, a once-off payment. Invoices are sent to the billing contact as listed in the application form. The payment is due five days from the receipt of the invoice.

Applications for new domain names are processed in chronological order of receipt by ROTLD (on a "first-come, first-served" basis). E-mails are processed in chronological order of arrival, as they appear in the in-box of ROTLD. The legal entity or the individual seeking registration is fully responsible for its entries in the application form and is therefore required to supervise any records in the repository belonging to that particular legal entity or individual.

Applications for modifications (and deletions) of domain names are processed in a manner similar to that described above. Exceptions to chronological order may be possible under certain circumstances and upon special request by registrants.

Registering a domain name does not confer any legal rights to that name. Therefore, any disputes between parties over the rights to use a particular name are to be settled between the contending parties, using common legal means. Domain names are allocated to the holder (domain owner). If the application was filed by another party on behalf of the holder, the person who holds the domain name is the third party beneficiary of the contract between the applicant and ROTLD. Holding the domain name is conditional upon the holder's acceptance of the Rules for name registration within the .ro domain and its sub-domains and the Registration Agreement, available at <www.rotld.ro>.

In case of disputes, when a domain name has already been registered by another legal entity or individual or is in progress of registering, it is the responsibility of the legal entity or the individual seeking the registration to check the existing

repository and pursue any litigation which may be necessary against the existing registrant, if the said entity or individual believes that the existing registrant has no right to that domain. Legal entities, individuals and registrants acknowledge and agree that ROTLD cannot act as an arbiter of disputes arising out of the registration and use of domain names. Registration of a pending application for a domain name will be suspended by ROTLD in case of a conflict with another pending application or an already registered active or inactive domain name, until the conflicting registrants present a written and duly signed settlement of the conflict or a court decision resolving the dispute in favor of one of the conflicting parties. In the event that a dispute arises between a domain name holder and a third party complainant, the ROTLD Registry will assist the two parties to reach a mutually acceptable resolution to the dispute.

As a general rule, the Registry ROTLD will take action on a matter when it is clear that a registrant is breaching the Registration Agreement. When a mutual resolution is not successful, the complaint is subject to the Uniform Domain Name Dispute Resolution Policy endorsed and approved by ICANN (Internet Corporation for Assigned Names and Numbers).

On the basis of this Dispute Resolution Policy, several cases focusing on ".ro" domains have been brought before the WIPO Arbitration and Mediation Center:

(i) Koninklijke Philips Electronics N.V. v. SC Evergreen Consult & Aviation SRL http://www.wipo. int/amc/en/domains/decisions/html/2001/dro2001 -0001. html, with regard to the domain name "philips.ro;"

(ii) Paradox Security Systems Ltd. v. SECPRAL COM SRL http://www.wipo. int/amc/en/domains/decisions/html/2002/dro2002-0005.html, with regard to the domain name "paradox.ro;"

(iii) Sairgroup v. Amaltea Impex SRL and Evergreen SRL http://www.wipo. int/amc/en/domains/decisions/html/2001/dro2001-0002.html, regarding the domain name "swissair.ro;" *

(iv) AT & T Corp. v. Linux Security Systems http://www.wipo.int/amc/en/ domains/decisions/html/2002/dro2002-0002.html, concerning the domain name "att.ro."

In each of these cases, the respondents were required to transfer the respective domain names to the complainants.

B. INTELLECTUAL PROPERTY ONLINE

1. General

The intellectual property rights of a company or individual in Romania are protected mainly through the following legal provisions:

(i) Trademark Law no. 84/1998, as amended;

(ii) Regulation for the application of the Trademark Law;

(iii) Patent Law no. 64/1991, republished;

(iv) Copyrights Law no. 8/1996, as amended; and

(v) Industrial Designs Law no. 129/1992, as amended.

In addition to the above, Romania is a party to several international conventions, treaties and arrangements on intellectual property protection, such as:

(i) The Paris Convention;

(ii) The Arrangement from Madrid;

(iii) The Regulation for the application of the Arrangement from Madrid;

(iv) The Protocol related to the Arrangement from Madrid for the international registration of trademarks; and

(v) The Arrangement from Nice,

hereinafter **"IP Laws").**

The IP Laws (similar to legislation of other countries) deal with specific laws and regulations for each main category of IP rights: (i) trademarks; (ii) patents; (iii) copyrights; and (iv) industrial designs, each having their own legal regime (in terms of rights protected, actions to be taken, conditions to be met, proceedings for registration, etc.).

A very important feature of the IP Laws is that in order for a company or individual to benefit from the protection granted by law to its intellectual property (except for copyrights), it is necessary for this property to be duly registered according to the IP Laws—either as a trademark, invention or industrial design. In this respect, international registration by itself would not always be enough for gaining protection also under IP Laws.

As regards copyrights, in principle, these are fully protected from the date the work has been created, with no subsequent obligations for registration. The individual bringing the work to the attention of the public is deemed to be the author of the work, until the contrary is proven.

"First to file" is another principle that usually applies to intellectual property rights according to the IP Laws (within the limits provided by "priority registration" provided by the Paris Convention), especially to trademarks. It also applies in slightly different forms to patents or industrial designs. On the other hand, the "First to use" principle does not give rise to lawful ownership of a trademark, patent or industrial design, such as in the legislation of other countries (e.g. U.S. law).

2. Intellectual Property Protection on the Internet

The IP Laws do not contain specific provisions with respect to the protection of intellectual property rights on or in relation to the Internet. Nevertheless, the common rules mentioned above are applicable also to electronic business. Thus, in order for

a trademark used on or in relation to a website to be protected in Romania, it has first to be registered or recognized by the Romanian competent authorities (State Office for Patents and Trademarks) according to the applicable laws. In the same manner, in order for a pattern, method of design, method of arranging the information on a website or of making the links, used by a company or individual in either providing Internet services or designing a website to be protected under the IP Law, they have to be registered or recognized by the competent Romanian authorities. Otherwise, any action in court against a company or individual designing a very similar website to the one of the plaintiff (using the same methods, colors, arranging) will have slender chances of success under current Romanian law.

Copyrights are easier to protect if a work is published, issued or contained in a website, as they do not have to be registered in principle and are automatically protected from the date the work was created. Although the Internet is not specifically mentioned in the IP Laws as a method of bringing an intellectual work to the attention of the public, under current provisions, the Internet can easily be considered as such. Nowadays, publishing an article first on a website has practically the same effects as publishing it in a newspaper.

It also worth mentioning that a website (as a whole) may also gain protection under the IP Laws, to the extent that it could be considered as a work pursuant to the IP Laws. Although not expressly mentioned as intellectual works, under current provisions, there may be several material arguments sustaining that a website might be considered a work (that involved an intellectual activity of creation), such as more classical works like songs, movies or computer programs.

On the other hand, any and all infringements on the Internet of intellectual property rights of a third party—by way of unauthorized publishing, translation or use—of works, trademarks, inventions, industrial designs on a website shall produce the same effects and shall incur the same liability to the infringing party as if the infringement were done by any other method. Consequently, the sanctions that can be enforced on a website or website owner are the same.

The most common infringements of intellectual property rights made against Romanian websites are:

(i) unlawful use within the names or addresses of websites of elements identical with or similar to registered trademarks of third parties;

(ii) unlawful use within the names or addresses of websites of famous names with no real connection between the owner of the Web site and the owner of the famous name;

(iii) unlawful publishing of a work on a website, allowing downloading and printing of that work; and

(iv) unlawful use of images, photos, slogans, industrial designs on a website.

C. TAXATION OF ONLINE TRANSACTIONS

1. General

Romania has a rather unstable tax system. Tax regulations are subject to quite frequent amendments and constantly added texts, which makes it difficult to precisely comprehend and to apply, in an orderly and uniform manner, the legal provisions in a specific matter. According to Article 2 par. (4) of Law no. 365/2002 on electronic commerce, the provisions of the Romanian laws related to the taxation system become applicable in the case of electronic commerce.

The basis of the Romanian legal framework for the taxation system mainly consists of the following regulations:

(i) The Romanian Fiscal Code; and

(ii) Romanian Customs Code,

(hereinafter "Taxation Laws").

There are no specific regulations referring strictly to taxation of online business. Consequently, persons managing online businesses, who are entering into electronic transactions involving Romania, are subject to the same taxation regime which is applicable to common businesses.

2. Taxation system applicable to online transactions

a. General

According to the Taxation Laws, taxpayers must pay various taxes, duties and contributions, generated by:

(i) current activity;

(ii) payment of salaries;

(iii) possession of assets (movable and immovable goods); or

(iv) other obligations.

Depending on these criteria, the obligations may be classified as follows:

(i) obligations generated by the current activity;

(ii) obligations generated by the payment of salaries;

(iii) obligations of the legal entities;

(iv) obligations of the employees (retained and paid by the employer);

(v) obligations generated by assets; and

(vi) other obligations, such as local taxes or taxes due to the State for various public services.

b. Direct taxes—the Profit tax

Taxation Laws establish the following categories of tax payers:

(i) Romanian legal entities, for the taxable profit obtained regardless the sources, namely within or outside the Romanian territory;

(ii) foreign legal entities operating a fixed base in Romania, for the taxable income obtained from this base;

(iii) foreign legal entities and individuals acting in Romania via partnership without legal personality, for all income resulting from their activity in Romania;

(iv) Romanian legal entities and individuals, for their income obtained in Romania or outside the Romanian territory and resulting from partnership without legal personality (in this case, the profit tax is to be calculated, withheld and paid by the partners, legal entities); and

(v) foreign legal entities for their taxable income resulting from the real estate located in Romania or of the transactions with bonds or shares of a Romanian legal entity.

As a general rule, the tax on income and profit is unique, amounting to 16 percent of the taxable income, except for several cases expressly provided by the law such as:

a) Gambling in which case the tax fee is of 20%.[2]

b) In case of bonds obtained before May 31, 2005 the tax fee is 1% irrespective of the date of their sale.

c) In case of real estate business if a period greater than 365 day is passing between the date of purchase and the date of sale of such assets the tax fee **is 1%.**

The tax is payable on a quarterly basis by the 25th day of the first month of the quarter following the date profit was obtained, except as provided by the Fiscal Code.

i. Taxes to be paid by non-residents

Income realized by any non-resident individual or legal entity from activities performed on Romania's territory or from operations made with Romanian legal entities or with other entities authorized to operate in Romania's territory, as well as

2 Currently, online gambling is a rather tricky issue in the Romanian legislation. Although not expressly prohibited, the public authorities who are regulating and overseeing offline gambling are very reluctant to grant authorizations for Internet games and bets. Moreover, recently a draft law has been issued to be introduced in the Parliament, which will in future criminalize online gambling. However, it is hard to predict if and when this draft law will come into force and how the public authorities will address until then online the regular gambling issues.

with Romanian individuals authorized to perform, on their own account, activities which bring income, are subject to the taxation set up by this Fiscal Code, irrespective of whether the amounts are collected in Romania or abroad.

In case there are conventions for the avoidance of double taxation between Romania and other states, the provisions of such conventions shall apply, corroborated with the provisions of the Taxation Laws. In order to apply the conventions for the avoidance of double taxation, the beneficiary of the income shall present to the fiscal bodies of Romania the fiscal residence certificate, issued by the fiscal authority from its residence country, attesting that he or she is a resident of the respective state and the provisions of the convention for the avoidance of double taxation are applicable to him or her.

c. **Indirect taxes**

The Romanian legal framework provides for the following main categories of indirect taxes:

- the value added tax ("VAT");
- excises; and
- customs taxes.

i. **VAT**

The VAT standard rate applicable to taxable operation is 19 percent, but the law also provides for several VAT exempt operations. VAT shall be applicable to all operations consisting of delivery of goods or service performance or other assimilated operations executed in an independent manner by taxable entities as result of an economic activity provided by the Fiscal Code, performed within Romanian territory

ii. Excises

Excises are special consumption taxes assessed on certain products, namely:

a) mineral oils;

b) alcohols; and

c) processed tobacco.

iii. Customs taxes

According to the Romanian Customs Code, customs taxes are applicable to all goods imported to or exported outside the Romanian Territory by legal or natural persons.

The Code provides for two types of customs regimes: definitive regimes (such as for the importation of commodities) and temporary regimes. The definitive regime implies payment of the customs duties, while the temporary regime usually provides exemptions from customs duties payment. The temporary regimes

consist of special rules for assets that are brought into Romania that are not meant to remain therein. In principle, they need to be identifiable. Another rule governing the temporary regimes is that the customs authorities grant them for a certain period of time.

3. **Other Relevant Taxes**

Beside the above mentioned main taxes due by any company which intends to conduct business in Romania, Romanian laws provide also for different regulations related to taxation that are applicable to specific activities, such as advertising and promotion taxes.

D. ELECTRONIC TRANSACTIONS AND CONTRACT FORMATION

1. General

Contract formation is mainly regulated by the Civil Code and by the Commercial Code. Article 35 par. l of the Commercial Code comprises a special provision regarding contract formation between absent parties, according to which the contract becomes binding at the moment when the acceptance of the offeree is acknowledged by the offeror.

Generally, these common private law provisions do not require contracts to be concluded in writing. The written form is requested only for matters related to the proof of the legal relationship that has been created by the contract. In a few situations, such as sale and purchase of land, the law expressly requires the contract to be concluded in writing, before a public notary, in order to make it binding between the parties. For the large majority of contracts, however, there is no need to conclude a contract in writing, except to improve certainty and assure clarity of obligations, preventing litigation that might result from uncertainty.

2. Regulations applicable to Online Contracting

Online contracting is primarily governed by:

(i) the Law no. 365/2002 regarding electronic commerce, as further amended;

(ii) the Law no. 455/2001 regarding electronic signatures; and

(iii) the Government Ordinance no. 130/2000 regarding distance contracting.

Similarly to Law no. 365/2002 (harmonized with Directive 2000/31/EC of the European Parliament and of the Council of June 8, 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market), the Law no. 455/2001 and the Government Ordinance no. 130/2000, have also been based on European Union directives, namely: *the Directive 1999/93/EC of December 13, 1999 on a Community framework for electronic signatures* and the *Directive 97/7/EC of May 20, 1997 on the protection of consumers in respect of distance contracting.* While the Law no. 455/2001 regulates the legal regime of digital signatures and digital documents, the Government Ordinance no. 130/2000 completes the set of existing provisions within the Law no. 365/2002, in order to

strengthen consumer protection in relation to executing and performing distance contracts between consumers and suppliers.

The Law no. 455/2001 basically provides that an electronic document having an extended electronic signature, based on a certificate issued by a certification authority, has similar legal effects to an ordinary private signature document. The law sets forth the fundamental rules for providing certification services, supervision and liability of certification service providers. The powers of such authority are at this moment granted by the law to the Ministry of Communications and Information Technology. The Ministry is currently exercising these powers through the Authority of Regulation and Oversight. At this time, there are five certification service providers, performing their activity under the Authority supervision.

The Government Ordinance no. 130/2000 is primarily focused on specific information that must be given by the goods or service provider to the consumer, before the distance contract is executed. Furthermore, the Ordinance regulates the unilateral termination of the contract by the consumer, the terms under which such termination may occur, as well as specific contracts that generally cannot be subject to such termination (except if the parties agree otherwise). Specific provisions refer also to the performance of distance contracts and the duties that have to be fulfilled in relation to such contracts by the goods or service provider, in order to properly protect consumer legitimate rights and interests.

3. Contracts concluded by electronic means

According to Article 7 par. l of the Law no. 365/2002, contracts concluded by electronic means have full legal effect recognized by the law, provided that the legal requirements for contractual effectiveness have been met. Paragraph 2 of Article 7 further provides that, in order for contracts which have been concluded by electronic means to be binding, the prior consent of the parties with respect to the use of electronic means is not necessary. Proving the execution of contracts by electronic means, as well as the duties that result from these contracts, is subject to the provisions of the Law no. 455/2001.

By enacting these provisions, the Romanian legislators have implemented a new type of contract formation that leads to a fully binding agreement between contracting parties.

An essential and also sensitive issue in online contracting is the proper information of the recipients of information society services. The service provider has the duty—according to Article 8 of the Law no. 365/2002—to provide the recipient, prior to an order being placed by the latter, with the following information:

(i) the technical steps to be followed in order to conclude the contract;

(ii) whether or not the concluded contract will be filed by the service provider and whether it will be accessible;

(iii) the technical means for identifying and correcting input errors in the process of order placement;

(iv) the language in which the contract may be concluded; and

(v) relevant codes of conduct to which the service provider is committed, as well as the electronic means by which these codes may be concluded.

All this information must be made available to the recipient in a clear, comprehensible and unambiguous way, However, the parties may agree to deviate from the duty of providing information, as set forth in Article 8 of the Law no. 365/2002, but only under the condition that none of them is a consumer. Consequently, only in "Business to Business" relationships, where the parties are fully capable to legally protect themselves, is such deviation allowed. Standard contract clauses and general contracting terms must also be provided to the recipient, in a manner able to facilitate their storage and reproduction. It is important to stress that these requirements concerning recipient information are not applicable with respect to contracts that are exclusively concluded by e-mail or other similar individual communication means.

Article 9 of the Law no. 365/2002 provides the main rules applicable to electronic contracting. As a general principle, if not otherwise agreed by the parties, a contract shall be deemed to be executed when the offeror becomes aware of the acceptance of the contractual offer, but only if none of the parties is a consumer. Apart from the general rule, the law grants the parties the possibility to agree between themselves the moment of contract execution, without any interference. However, should such an agreement on contract formation occur, the specific terms must be carefully drafted, in order to avoid litigation.

The law provides for a derogatory solution in the case of contracts that, by their nature or at the request of the beneficiary, require immediate performance of the specific service. Such contracts are deemed to be executed when the provider commenced performance, except for the case when the offeror requested to be previously sent the acceptance. In this last case, the contract shall be deemed to have been executed when the offeror became aware of the acceptance of the contractual offer.

Further, if the recipient sends by electronic means the contractual offer or the acceptance of the firm contractual offer made by the service provider, the service provider must confirm the receipt of the offer, or, as the case may be, the acceptance of such offer, by one of the following methods:

(i) sending an acknowledgment of receipt by electronic mail or by other equivalent individual communications, to the address specified by the recipient, without any delay; or

(ii) confirmation of the receipt of offer or acceptance, by an equivalent means to the one used for sending or accepting the offer, as soon as the offer or the acceptance was received by the service supplier, provided that this confirmation may be stored and reproduced by the recipient.

These legal provisions have been enacted in order to strengthen the recipient's legal position and to always assure him or her of the way the contract has been

executed, leaving no doubts that might lead to subsequent legal issues. However, according to a recent study, these provisions do not expressly establish when the actual moment of contract formation occurs; they merely point out the technical steps to be undertaken in order to execute an electronic contract. Still, the duty of confirming the receipt of the offer or acceptance of the offer might lead to the conclusion that contract formation is determined at the moment in which the transmission of the receipt acknowledgement of the acceptance of the offer has been made.[3]

The offer or the acceptance, as well as the confirmation of receiving the offer or the acceptance, made by one of the methods provided under a) or b) above, shall be deemed received when the parties to which they are addressed can access them. Practically, electronic contract formation occurs at the specific moment at which the offeror receives the acceptance, once this can be accessed. The offeror is actually checking the consent of the recipient with respect to the proposed clauses of the contract.4

These rules referring to confirmation of receipt of the offer, or of the acceptance of such offer, do not apply to contracts concluded exclusively by electronic mail or by equivalent individual communications.

E. ONLINE PRIVACY

1. General

There are two laws regulating data protection issues:

• Law no. 677/2001 for the protection of persons with respect to the processing of personal data and the free circulation of personal data (the **"Law no. 677/2001");** and

• Law no. 506/2004 on the processing of personal data and the protection of privacy in the telecommunications sector (the **"Law no. 506/2004").**

These two laws have been enacted in full compliance with the relevant European Union directives, namely:

• Directive 95/46/EC of the European Parliament and of the Council of October 24,1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (published in the Official Journal L 281,11/23/1995); and

• Directive 2002/58/EC of the European Parliament and of the Council of July 12, 2002 concerning the processing of personal data and the protection of

3 Tiberiu Gabriel Savu, *Unele consideratii pe marginea efectelor noii reglementari privind comertul electronic asupra regulilor in materia formarii contractului (Some comments upon effects of the new regulation regarding electronic commerce, on contract formation rules),* Revista de drept comercial nr.9/2002, p,108.

4 *Ibid.,* p.109.

privacy in the telecommunications sector (published in the Official Journal L 201, 7/31/2002).

Both laws also implement the provisions of Article 26 par.l of the Romanian Constitution, according to which the State protects and respects privacy, intimacy and family life. The Law no. 677/2001 applies mainly to processing of personal data, made entirely or in part by automated means. This law establishes a general framework covering the essential rights of persons with respect to data privacy.

2. Information Privacy Principles

Persons whose data are subject to personal data processing, enjoy the right to be informed by the data processing operators with respect to:

a) the identity of the operator;

b) the purpose for which the data processing is undertaken; and

c) the recipients of data.

Data subjects are also entitled to obtain from the operator, free of charge once a year, a confirmation stating whether the data referring to them have been actually processed by the operator or not.

The law also grants to die persons involved the right to request that the operator:

a) correct, update, block or delete data that are inaccurate, incomplete or which processing is against the law; and

b) convert data which cannot lawfully be processed into anonymous data.

The public authority charged with the supervision of personal data processing is the National Authority for Personal Data Processing Oversight, who has the power to regulate this field, to investigate breaches of law and to solve complaints submitted by involved persons. This public authority has been established through the Law no. 102/2005, as a body whifch reports to the Parliament.

Based on the fundamental provisions of the Law no. 677/2001, the Law no. 506/2004 offers a more specific insight on telecommunications privacy. This law applies to operators of public telecommunications networks and to telecommunications services providers who are handling personal data in the process of service provision. The law requires service providers to assure security of services and networks, as well as confidentiality of communications.

Besides tiiese two laws, commercial communication has been regulated within the Law no. 365/2002, as a particular aspect of online privacy. According to Article 6 par. 1 of the Law no. 365/2002, undertaking commercial communications by electronic mail is forbidden, except in the case where the recipient previously expressed his or her consent to receive such communications. Consequently, Romania has adopted the "opt-in" system in this field, in the interest of recipients of information society services, by putting the burden of formalities on the service providers' shoulders.

In order to implement these basic legal provisions, Government Decision no. 1308/2002 has been issued, by which Methodological Norms have been adopted. According to the Norms, the consent of the recipient may be expressed in any legal form and it can be proved by any legal means. However, the burden of proof lies on the service provider. Practically, consent issued by e-mail is valid if two requirements are met:

it has been sent from the mailbox in which the recipient wishes to receive commercial communications; and

a) the subject of the message must expressly include the statement "I ACCEPT COMMERCIAL COMMUNICATIONS FROM...," written with capital letters, mentioning the person on whose behalf commercial communications will be sent.

If there is a consent from the recipient with respect to commercial communications, the provider has to fulfill the following conditions:

a) the commercial communication has to be clearly identifiable as such;

b) the individual or legal entity on whose behalf the commercial communications are made must be clearly identifiable;

e) promotional competitions and games must be clearly identifiable as such, and the conditions for participation must be easily accessible and clearly presented; and

f) any other conditions imposed by the legal provisions currently in force.

A recipient's consent may be withdrawn at any time, by a simple notice sent to the service provider. In order to ease revocation of consent by recipients, service providers are compelled to implement afree of charge electronic procedure that has to be made public on the providers' websites as well as within the commercial communications. Revocation of consent by electronic means becomes effective within 48 hours from the moment of procedure initiation. Consequently, after 48 hours, transmission of commercial communications to the recipient have to cease.

Special requirements have also been provided with respect to commercial communications issued by members of regulated professions. In this respect, commercial communications which are part of, or constitute an information society service when this service is provided by a member of a regulated profession, are permitted, subject to compliance with the legal provisions and professional rules regarding in particular the independence, dignity and honor of the profession, professional secrecy and fairness towards clients and other members of the profession.

Issues such as monitoring e-mail of employees and liability of employers for e-mail of employees have not yet been addressed by Romanian legislation, nor is there any official case law referring to such matters.

F. ONLINE DEFAMATION AND REGULATION OF ONLINE CONTENT

1. General

The matter of free speech in cyberspace has not yet been specifically addressed by Romanian courts and scholars. Freedom of speech is a value re-established in Romania after 1989, being up to this moment one of the basic element of Romania's democratic society. However, crossing the line of free speech by promoting libelous language in the overall media became unfortunately a common phenomenon, since the legal means meant to dissuade such conduct are not effective enough.

Defamation has mainly been regulated by the Romanian Criminal Code, which criminalized insults and libel. According to the Criminal Code, insult had been criminalized as being any injury caused to one's honor or reputation by means of words, gestures or other means, or by conferring a person a default, disease or infirmity, which even if be true should not be revealed. However, this provision has been eliminated from the Criminal Code, leaving insults subject only to civil liability, irrespective of the means (electronic or otherwise) by which they have been disseminated.

Libel is regulated by Article 225 of the Criminal Code, which states that:

"The assertion or reproaching in public, through any means, of a deed referring to a person, who, in case this would be real, would expose this person to a punitive, administrative or disciplinary sanction or to the public contempt, is sanctioned with 10 to 120 fine-days.

1) Prosecution shall start subject the prior complaint of the injured person.

2) The reconciliation of the parties removes any criminal liability."

Libel shall not be sanctioned if the assertion or the reproaching has been proved and established, or the perpetrator proves that he had reasons to believe that it was true.

2. Online defamation

Online defamation does not have, in principle, a specific regulation. Particular aspects related to online content are subject to the Law no. 365/2002. While regulating electronic commerce, this law provides that general laws and regulations related to the civil, contraventional and criminal liability are to be applicable also to the providers or suppliers of online services. Consequently, the Romanian Civil Code provisions related to tort or contractual liability shall become applicable whenever the providers or suppliers cause to any third parties damage related to defamation, as result of an extra-contractual action or a breach of a contractual obligation. Further, any conduct of an online provider or supplier that might be deemed an infringement of the criminal law (e.g fraud, embezzlement) shall become regulated by the Romanian Criminal Code provisions.

There are several guiding principles in connection with the suppliers' liability, established at a legal level. Such principles are applicable only in connection with

the providers or suppliers liability for the information transmitted, stored and to which they have facilitated access. Thus, according to Article 11 par. 2, service providers are liable for the information provided by themselves or on their account. The suppliers are not liable for information sent, stored or to which access is facilitated.

a. Mere transmission

Where an information society service consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, the provider of that service shall not be liable for the information transmitted if all the following conditions are jointly met:

(i) the transmission was not initiated by the online service provider; and

(ii) the provider did not select the receiver of the transmission; and

(iii) the content of the information has not been influenced by the service provider in any way, in the sense that neither the selection nor the possible modification of this information may be attributed to the same.

b. Temporary storage of information ("caching")

According to Law 365/2002, in case an information society service consists of the transmission in a communication network of information provided by a recipient of the service, the provider of the service is not liable for the automatic, intermediate and temporary storage of that information, to the extent that this operation is performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, provided that all the following conditions are met:

(i) the provider does not modify the information transmitted;

(ii) the provider complies with legal conditions on the access to the respective information;

(iii) the provider complies with rules or practices regarding the updating of the information, as widely recognized and used in the industry;

(iv) the provider does not interfere with the lawful use by any person of technologies widely recognized and used in the industry, in order to obtain data on the nature and use of the information; and

(v) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge 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.

c. Permanent storage of information ("hosting")

In case of storage of information provided by a recipient of the service, the service provider is not liable for the information stored at the request of a recipient of the

service, if any of the following conditions is met, except when the recipient is acting under the authority or the control of the service provider:

(i) the provider does not have actual knowledge of the illegality of the activity or information stored and, as regards claims for damages, is not aware of any acts or circumstances from which it would follow that the respective activity or information may injure the rights of a third party; or

(ii) the provider, upon becoming aware that the respective activity or information is illegal or becoming aware of acts or circumstances from which it would follow that the respective activity or information may injure the rights of a third party, acts expeditiously to remove or to disable access to the activity or information.

These legal provisions shall not prevent a judicial or an administrative authority requesting the provider to cease or prevent violation of data, and shall also not affect the possibility of establishing governmental procedures for limiting or disrupting access to information.

d. Information search instruments and links to other web pages

The supplier of an information society service which facilitates access to information supplied by other service providers or by the recipients of services supplied by other providers, by making available to the recipients of its service, information, search instruments or links with other web pages, is not liable for the respective information if any of the following conditions is met, except when the recipient is acting under the authority or the control of the service provider:

(i) the supplier is not aware that the activity or information providing access is illegal and, as regards claims for damages, is not aware of any acts or circumstances from which it would follow that the respective activity or information may injure the rights of a third party; or

(ii) the provider, upon becoming aware that the respective activity or information is illegal or becoming aware of acts or circumstances from which it would follow that the respective activity or information may injure the rights of a third party, acts expeditiously to remove utili2ation or to disable possibility of access to the respective activity or information.

A service supplier shall be liable for the respective information when its illegality was declared by the decision of a public authority.

e. Proceedings

As regards the procedure to be followed by a person who claims to be prejudiced by the content of information, Law 365/2002 establishes specific procedures, such as the "complaint" or the "notification" to be submitted by the prejudiced person to the competent public authority. The complaint or notification shall be drafted in writing, showing the reasons on which it is grounded, and must be dated and signed. The competent public authority must issue a decision which shall be grounded and

notified to the interested parties within 30 days of the date when the complaint or notification was drafted or, if the authority acted as officio, within 15 days of the date when it was issued. Against such decision, the interested person may file an objection within 15 days of its communication, with the competent court of administrative claims. The application shall be judged under an emergency regime, with summoning of the parties and the judgment passed by the court as final.

f. Control

For the purpose of preventing online defamation, the Law no. 365/2002 establishes a mechanism of control which, on one hand, imposes several obligations on online providers or suppliers, of which the most significant are:

(i) to inform at once the competent public authorities on the allegedly illegal activities pursued by the recipients of their services or on the allegedly illegal information provided by the recipients of their services;

(ii) to communicate immediately to the competent authorities, at their request, information allowing identification of the recipients of their services, with whom these providers have concluded contracts regarding the permanent storage of information; and

(iii) to cut off, temporarily or permanently, the transmission in a communication network or the storage of information supplied by a recipient of the respective service, especially by eliminating the information or blocking access to such information, access to a communication network or provision of any other information society service, if these measures have been ordered by a public authority, ex officio or at the receipt of a complaint or notification from any person).

On the other hand, the law expressly provides that the duties of the competent authorities (at this moment, the Ministry of Communications and Information Technology) include supervision and control of compliance by service providers with the provisions of the applicable laws, detecting contraventions and applying the appropriate sanctions.

C. CONSUMER PROTECTION IN ONLINE BUSINESS

1. General

The basis of the Romanian legal framework for the protection of consumers is established by Government Ordinance no. 21/1992 on consumers protection, as repeatedly amended (hereinafter the **"Consumer Law").**

According to the Consumer Law, consumers are individuals who, in their capacity as end beneficiaries, acquire, use or consume products that are obtained from commercial entities or benefit of their services. Commercial entities are either individuals or companies that produce, import, transport, store or sell products or a part thereof or provide services. Given this general approach, online businesses and activities of the providers of information society services fall (as do most businesses) under the provisions of the Consumer Law.

In addition to the Consumer Law, the relevant laws mentioned in Chapter 1 Section B above comprise also provisions that are essential to consumer protection within the electronic environment, with special view to the recipients of information society services.

2. Consumers' Protection on the Internet

Data transfer and online business are considered by many as creating vulnerability and uncertainty both for transactions carried out through the Internet and also for the person itself and the business. In this respect, the relevant laws seek to provide confidence to consumers and online businesses by establishing precise rules, especially regarding data that service providers have to submit about themselves to recipients, as well as personal data of recipients that have to be kept secure.

As a direct consequence of providing confidence to consumers, most Romanian websites engaged in electronic business now have specific sections disclosing the terms and conditions on which online business can be done on that site, how and to what extent personal data are processed and used further, as well as disclaimers warning consumers on the limits of the operator's liability.

Online business may enable abusive practices towards consumers such as so called "referral selling," or "pyramid schemes," as the Internet is one of the most low cost and efficient methods of both selling products and advertising. Although Romanian legislation does not encompass express provisions defining or even referring to the above concepts or other concepts very much used within the Internet, such as "ambush marketing," "subliminal marketing" or "deceiving marketing," these practices are considered illegal not only by the Consumer Law, but also by Law no. 11/1991 on unfair competition and Law no. 148/2000 on advertising. According to the Consumer Law, abusive commercial practices towards consumers, as well as advertising which may adversely affect the rights and the welfare of the consumers are prohibited.

Products or services that are sold or offered online have to comply with the same rules and regulations governing products or services offered by traditional means, as regards to the quality or defects of the product, warranty offered by the sellers or producers to their customers, and other relevant aspects. Consequently, an online consumer shall have the right to recover damages caused by the purchased products that do not comply with the characteristics disclosed by the seller, to be exonerated from paying for products that have not been ordered or do not comply with the quality and characteristics of the product that was presented to the customer when concluding the contract and to pay the price for which it was agreed when concluding the online order and no further increases of the price.

Online sellers have the same duties toward their online clients, such as the obligation to replace the delivered product if the product does not comply with the characteristics described in the offer, to provide the customer with all necessary instruction brochures for the proper use of the product, to provide a warranty certificate for the product in accordance with the applicable laws regarding warranty

and to refund the price if the product was not replaced or the customer does not accept the replacement.

H. COMPETITION LAW AND ONLINE BUSINESS

1. General

Similar to most European legislation, Romanian competition law is split into three main sections:

(i) merger control;

(ii) anti-competitive practices;

(iii) abuse of dominant position; and

(iv) State aid.

Relevant for legal issues related to electronic business are those sections referring to merger control, anti-competitive practices and abuse of dominant position. The basis of the current legal framework in the merger control field and anti-competitive practices in Romania, is set out by:

(i) Law no. 21/1996 on competition;

(ii) Regulation issued by the Competition Council on authorization of economic concentrations;

(iii) Instructions issued by the Competition Council on market definition;

(iv) Regulation issued by the Competition Council for the enforcement of articles 5 and 6 of Law no. 21/1996,

(hereinafter **"Competition Law").**

As in any other field of business, mergers and acquisitions take place between companies engaged in online business. Therefore, Competition Law applies equally to electronic business, there being no exceptions or special provisions of any kind in this respect.

2. Merger Control in Online Business

An "economic concentration" occurs when any act (irrespective of its form):

(i) results in a transfer of ownership (or use) of all (or a part thereof) of the assets, rights and obligations of a company from one company (or group of companies) to another company (or group of companies);

(ii) whose purpose or effect is to allow a company (or group of companies) to exercise, directly or indirectly, a decisive influence over another company (or group of companies).

The usual forms of obtaining control are:

(i) acquisition of shares;

(ii) acquisition of assets; or

(iii) developing relations of economic dependency by concluding medium or long term agreements of supply, between a supplier and a client combined with common structures, giving the supplier a decisive economic influence over its client.

If any of the above takes place following an online transaction between two persons (legal entities or individuals or a combination thereof), the said transaction shall fall under the provisions of the Competition Law.

Most economic concentrations take place, however, through common paths and may concern companies involved in Internet business. Currently, in Romania, the market of companies having online supply of good and services as their core business is characterized by the existence of numerous companies providing Internet services at local or regional level and a few only at national level, Economic concentrations that took place between such companies did not raise any difficulties in being cleared by the Competition Council.

Recently, however, big companies (both national and international) having their core business in telecommunications and cable TV have started to enter into the Internet business either to provide Internet access to their clients (companies) and to the public (through dial-up connections) or to offer to their clients (usually big corporations) Internet access as support for data transfer. In such cases, economic concentrations were more carefully addressed by the Competition Council as they involved big players on the Romanian market (such as Connex, Romtelecom, France Telecom, Global One, Astral TV, Kappa Servexim) and the transactions might have considerable effects on the market due to the parties economic capabilities.

Currently, it is estimated that in Romania 32 companies (all members of the Romanian National Association of Internet Providers) represent 85 percent of the Internet market (although there are around 400 companies authorized in this respect) and approximately 30 major transactions (economic concentrations) took place on the Internet market in the last few years. Among the most important transactions having effects on ^he Romanian market it is worth mentioning the acquisition by France Telecom of Equant NV, acquisition by Astral TV of Kappa Servexim, acquisition by RDS of Totalnet. The most important Internet providers in Romania are KPNQWest, Equant, Mobifon, RDS and SNR, none of them having a dominant position on the market, according to sources of the Romanian National Association of Internet Providers.

3. Anti-Competitive Practices and abuse of dominant position in Online Business

Due to numerous possibilities for providing Internet services to clients, large segmentation of clientele or the possibility of combining the supply of Internet services with other services like cable TV, data transmission, mobile and fixed telephony, the chances of encountering anti-competitive practices in this field are considerable. The Competition Council is therefore surveying attentively, especially the cable TV market, telephony market and data transmission market.

The most common anti-competitive practice in the field may be the market partitioning between various market players, or a price fixing cartel whereby the cartel

members undertake not to supply Internet access to a price less than a threshold mutually agreed in advance. As regards the acts that may constitute an abuse of dominance, according to the practice of the European Commission and the current market trends, the grant of Internet access free of charge or at symbolic prices as an additional service to the supply of other important services seems to be most favored by the market players and very disapprovingly seen by the Commission. By such practices, less effective companies and especially companies exclusively providing Internet services may be constantly harmed and even forced to exit the market. Until now, however, no sanctions were yet issued by the Competition Council against any Internet service providers. Given the extensive practice of the Commission and the fact that Romania is now a member of the E.U., we expect the Competition Council to adopt a more proactive role also in this field.

Since the trend of electronic business is to offer an increased number of services and transaction opportunities online and due to the fact that the essential characteristic of online transactions is that they are done between two persons that do not actually get in direct contact, abusive or unfair commercial practices may be more easily performed by companies doing business through the Internet. This is why Law no. 11/1991 on unfair competition and Law no. 148/2000 on advertising are also applicable to online business. Consequently, practices such as promoting bad advertising of competitors' products or services, attracting clientele or employees of a competitor through unfair practices and false advertising on websites are prohibited.

I. COMPUTER CRIMES

1. Computer Crime Law

The Law no. 161/2003 is currently the basic piece of legislation addressing a wide range of cybercrime issues.

The law is based on the Council of Europe Convention on Cybercrime (available at http://conventions.coe.int/TreatWen/Treaties/Html/185.htm) signed in Budapest, on November 23,2001.

The Romanian law focuses on the following aspects:

a) prevention of computer crimes;

b) punishment of crimes against confidentiality and integrity of data and computer systems;

c) punishment of child pornography; and

d) international cooperation between law enforcement agencies.

2. Computer Crimes provided within the Electronic Commerce Law

There are also a few important criminal law provisions within the Law no. 365/2002. According to these provisions, the following crimes are subject to punishment by imprisonment:

a) forging electronic payment means;

b) possession of equipment in order to forge electronic payment means;

c) false statements made in order to issue or to use electronic payment means;

d) performing fraudulent financial operations;

e) accepting the performance of fraudulent financial operations; and

f) performing unauthorized operations within a computer system.

More precisely, the legal provisions pertaining to these crimes are as follows:

ARTICLE 24
Forgery of electronic payment instruments

(1) Forgery of an electronic payment instrument shall be punished with 3 to 12 years imprisonment and prohibition of certain rights.

(2) The same penalty applies to the release, by any means, of forged electronic payment instruments or to possession for the purpose of releasing them.

(3) Punishment shall be 5 to 12 years imprisonment and prohibition of certain rights if the acts provided for in paragraphs (1) and (2) are committed by a person who, by virtue of his professional powers:

(a) undertakes technical operations necessary for the issuance of electronic payment instruments or for the performance of the types of operations provided by art. 1 10; or

(b) has access to the security mechanisms involved in the issuance or use of electronic payment instruments; or

(c) has access to the identification data or the security mechanisms involved in the performance of the types of operations provided by art. 1.10.

(4) Attempt shall be punished.

ARTICLE 25
Possession of equipment for the purpose of falsifying electronic payment instruments

Fabrication or possession of equipment, including hardware or software, for the purpose of falsifying electronic payment instruments shall be punished by 6 months to 5 years of imprisonment.

ARTICLE 26
False statements given for the purpose of issuing or using electronic payment instruments

Untrue statements given to a banking, credit or financial institution, or to any other legal entity authorized by law to issue electronic payment instruments or to accept the types of operations provided under art. 1.10, for the issuance or use of the an electronic payment instrument for one's own interest or for somebody else's interest, when, according to the law or the circumstances, the given declaration serves to issue or use that instrument, shall be punished by 3 months to 2 years of imprisonment or by fine.

ARTICLE 27 Fraudulent undertaking of financial operations

(1) Undertaking any of the operations set forth under art. 1.10, by using an electronic payment instrument, including the personal identification data allowing its use, without the consent of the legitimate owner of the respective instrument, shall be punished by 1 to 12 years of imprisonment.

(2) The same punishment shall apply to the performance of any of the operations set forth under art. 1.10, by the unauthorized use of any identification data or by the use of fictive identification data.

(3) The same punishment applies the unauthorized transmission towards another person of any identification data, for the purpose of performing any of the operations provided under art. 1.10.

(4) Punishment shall be 3 to 15 years of imprisonment and prohibition of certain rights if the acts provided for in paragraphs (l)-(3) are committed by a person who, by virtue of his professional powers:

(a) undertakes technical operations necessary for the issuance of electronic payment instruments or for the performance of the types of operations provided by art. 1.10; or

(b) has access to the security mechanisms involved in the issuance or use of electronic payment instruments; or

(c) has access to the identification data or the security mechanisms involved in the performance of the types of operations provided by art. 1.10.

(5) Attempt shall be punished.

ARTICLE 28 Acceptance of fraudulent financial operations

(1) Acceptance of any of the operations provided under art. 1.10, in full awareness that it is undertaken by the use of an electronic payment instrument which is falsified or used without the consent oftits legitimate owner, shall be punished by 1 to 12 years of imprisonment.

(2) The same penalty applies to acceptance of any of the operations provided under art. 1.10, in full awareness that it is undertaken by the unauthorized use of any identification data or by the use of fictive identification data.

(3) Attempt shall be punished.

The above-cited legal provisions are striving to cover all relevant criminal actions that might endanger the process of electronic payment or the proper use of computer systems. However, the Cybercrime law regarding "prevention and combat of cybercrime" is fostering and extending law enforcement in this area, with the aim to discourage such criminal activity, in a coordinated manner with all other countries that are part of the European Council Convention on Cybercrime.

3. Computer Crimes provided within the Criminal Code

Recently, a new Criminal Code has focused on some crimes that are performed by using computer systems or electronic means, such as computer forgery (article

445), computer fraud (article 446), promoting, lending or selling counterfeit products by electronic means (article 432 par. 6), deleting electronic copyright information from products (article 438 par. 2 letter a), illegally distributing copyrighted products through electronic means (article 438 par. 2 letter b), and forging electronic payment means (article 464 par. l).

J. SECTOR-SPECIFIC REGULATION

1. General

Besides the legal items described in the previous chapters, one can notice a trend by which specific regulations are designed and some put in place in order to cover particular areas involving online business. There is however no coherent and comprehensive effort meant to correlate such regulations or to reunite them, in order to have a more focused legislative approach, which would be to the benefit of both online business and consumers. This is because regulatory measures are taken in this field by several public authorities, which do not necessarily cooperate in order to promote a common legislative language and to establish connected rules. Another negative factor consists of the existence of indirect regulations addressing tangential aspects of an area that should have its own regulatory framework.

In recent years some significant pieces of legislation have been adopted in relation to online business. As a matter of fact, such lack of particular ruling affects both the banks and their clients, especially when it comes to "phishing," a phenomenon that has not yet been addressed by regulators, although it currently poses a significant threat to banking business.

2. Software export control

Romanian legislation has addressed the problem of software export control. The Government Emergency Ordinance no. 129/2006 regarding export control of products and technologies subject to double use includes software in the range of technologies that must be filtered by the National Agency of Export Control. It is worth mentioning that not only software exported by ordinary means became subject to such an oversight regime, but also software export performed by electronic means.

3. Capital Markets

a. Distance Contracting

Another domain that had been addressed by legislative means with respect to online transactions is the one involving capital markets. The Capital Markets Law no. 297/2004 regulates a specific type of distance contract regarding financial investment services, involving a stock-broker and an investor. The distance communications means include also electronic means facilitating both the execution and the performance of the contract. The law grants the investor the right to terminate such contract within 14 calendar days from the date it was executed, without notifying any specific reason to the stock-broker and without being penalized. Such termination right does not apply to financial services contracts whose price

depends on the financial markets' fluctuation occurring during the period of withdrawing from the contract. Such circumstances refer to currency exchange operations, monetary market operations, securities, forward contracts, swaps referring to interest rate, exchange rate and shares. In order to better protect an investor under such contractual relationships, the law imposes the regulatory authority to provide rules according to which investors are entitled to ex officio legal assistance in relation to litigation arising from these contracts.

Apart from the above mentioned financial investment services, the Government Ordinance no. 85/2004 regulates similar contracts, but concluded by distance communications means between consumers with stock-brokers. The same principles and rules as regards the 14 calendar days termination option and the exemptions to it, according to the Capital Markets Law no. 297/2004, apply also for this category of distance contracting. The sole difference is that while the Capital Markets Law no. 297/2004 refers to sophisticated investors (such as banks and other financial market institutions), the Government Ordinance no. 85/2004 protects consumer, *i.e.* individuals acting outside their professional, economic or commercial activity.

b. Stock market transactions

With respect to transactions performed by electronic means on the stock market, there are some basic provisions inside the Bucharest Stock Exchange Code (the "Code"). The Bucharest Stock Exchange is organized as a joint-stock company (established following a merger with the RASDAQ market—a market similar to the NASDAQ in the United States), acting as a self-regulatory body and enjoying the right to establish specific rules in order to process electronic transactions, as well as settlement and securities registration procedures.

According to the Code, only the securities companies, acting as members of the Bucharest Stock Exchange have the right to negotiate and to conclude transactions within the market. The provisions of the Code further establishes rules primarily regarding exchange brokers, processing of exchange orders, types of exchange transactions, cancellation of exchange transactions, trading sessions and stock watch.