OVERVIEW OF ELECTRONIC COMMERCE

DEFINITION AND STATUS OF SERVICE PROVIDERS; TRADING RESTRICTIONS; ONLINE CONTRACTS; LIABILITY OF INTERNET SERVICE PROVIDERS; SELF REGULATION; DISPUTE RESOLUTION

International Law Office Internet Publication
September, 2000

Author: Dr. Judit Budai

I. BACKGROUND OF ANTICIPATED LEGISLATIVE PROGRESS

The duty to harmonize existing laws as prescribed in the European Agreement concluded between Hungary and the European Communities, requires an appraisal of EU legislation when analysing Hungarian legal regulations relating to electronic commerce (hereafter "E-Commerce"), as Hungary has to consider amongst others, the EU-Directive 2000/31/EU on E-Commerce when passing specific legislation in this field.

In line with the above-mentioned harmonization, the Government plans to develop the competitiveness of micro, small and medium sized enterprises by putting into place a harmonized legal framework relating to E-Commerce until the end of 2000.

The most recent concrete legislation plan of the Government is the regulation of electronic signatures, on which topic a resolution was issued in August setting forth the principles governing such planned legislation.

The timing of the Hungarian legislative activity cannot be considered as lagging the actual practice, as according to economic sources in Hungary approximately 1.5 % of private households are currently using the Internet due to its high associated costs. High costs are expected to drop once the single nationwide telephone service provider's concession expires. In the economic sector, the estimated number of Internet users lies around 10 % which is expected to grow fast once costs become lower and certain specific regulations are introduced.

II. OVERVIEW OF THE REGULATION OF THE MAIN AREAS OF E-COMMERCE IN HUNGARIAN LAW ACCORDING IN THE ORDER OF THE MAIN REGULATED ISSUES OF THE EU-DIRECTIVE ON E-COMMERCE

2.1 Definition and Status of Service Providers (Internet Access Providers, Service Providers and Content Providers)

Act LXXII of 1992 on Telecommunication (the "Telecommunications Act")

According the rules of the Telecommunications Act, Internet Access Providers and Internet Service

Providers under Hungarian law are considered to be public telecommunication service providers (Public telecommunication service is defined in the Annex of the Telecommunications Act as providing the transmission of signals or providing access to subscribers and users in exchange of a certain fee). This service may be provided once an official service license has been issued by the Communication Authority.

The activity of an Internet Content Provider is not subject to any specific license in this capacity (which has been confirmed in the legal practice, e.g. by Decision No. 135/1998 of the Competition Authority). However, if the activity (on-line or off-line) - independent of the technical means used - is subject to a license or notification, the content providers must obtain the necessary operation license or be registered in official registries. Thus, e.g. electronic newspapers are subject to the rules of the Media Act (Act II of 1986), and their establishment - similarly to the establishment of non-electronic newspapers - must be reported to the ministry responsible for the registration of newspapers.

A main question in the EU was which law should apply to the Service Provider (Internet Service and Content Provider) in the sphere of E-Commerce, including its operation and the content of its home page: options include its private law, the private law of the consumer, or the applicable law of the place where the server of the Service Provider is located?

Presently in Hungary, this question arises in connection with international commercial relations and in connection with the legal position of Hungarian advertisers in international private law. In the absence of a unified consolidated legal framework in the sphere of E-Commerce, primarily the rules of the **Law-Decree Nr. 13 of 1979 on international private law** and especially its Chapter III on the Law of Intellectual Property and Chapter V on Contracts apply to commercial agreements with a foreign element.

2.2 The regulation of Commercial communication provided by service providers and of the protection of information accessible via the internet

Several Hungarian legal regulations on economy and trading, which have been harmonized with EU law, are directly or indirectly applicable to E-Commerce. These include the laws on **Advertising (Act LVIII of 1997), Consumer Protection (CLV of 1997) , Personal Data Protection (Act LXIII of 1992), and Intellectual Property laws, primarily the Copyright Act (Act LXXVI of 1999)**. Although some modification of these rules might be necessary for their application to Internet specific devises, e.g. the following:

SPAM

Although not specifically related to the Internet, Hungarian law provides for some restrictions regarding unsolicited commercial communication (economic advertisement).

Act on Advertising:
According to the Act on Advertising, the advertisement may only be published if the advertisement nature is clearly indicated and separable from the rest of the communication.

Government Decree Nr. 17/1999 (II. 5.) on distance selling:
Unless the consumer explicitly objects, a business may use a means of telecommunication that enables direct contact between parties, but does not fall within an offer made by telephone or fax. As a consequence, the use of SPAM is not admissible if the consumer explicitly objects to it.

Banking Act:
An exclusion from the scope of the above regulation is the **Banking Act (Act CXII of 1996)** which provides that the financial institution concerned is not authorised to send a client advertisement material via direct mail, if expressly prohibited by the client (Art. 201).

COOKIES

The use of Cookies primarily raises issues of consumer protection due to the collection and processing of data. When dealing with these issues, the laws of personal data protection, (e.g. **Act LXIII of 1992 on personal data protection and Act CXIX of 1995 on the use of name and address information servicing the purpose of research and direct marketing purposes**) have to be taken into consideration, which, in line with the practice in other European countries, follow the "safe harbour" principle. According to this principle, the collection, processing and transmission of data is only admissible with the prior approval of the authorized person. In addition, the purpose of the use of the data has to be made known to the authorized person, and at his request, the data must be deleted. In case of transmitting the data abroad, the Parliamentary Commissioner on Data Protection (ombudsman) is to be informed. Furthermore, the right to delete the data from the data centre, and the right to be informed of the purpose and method of data processing and use has to be made available to the data's authorized holder.

It is advisable to follow the recommendations of the Parliamentary Commissioner on Data Protection, giving a legal analysis on several Internet related issues, e.g. whether an e-mail address constitutes personal data (627/K/1998, 693/K1998) etc.

METATAG

If a case of unfair competition materializes due to the use of metatags, the competitor can commence legal action in reliance on the provisions of the **Competition Act (Act LVII of 1996)**.

LINKS

Links may only be applied in accordance with the laws on Intellectual Property (primarily the **Act IV of 1959 on the Civil Code, Trademark Act XI of 1997, the Copyright Act**) and on competition and advertising.

2.3 Online contracts

The general rules of Hungarian law concerning the conclusion of contracts is set forth in the Hungarian **Civil Code (Act IV of 1959**). These rules in international trade relations are supplemented by **Act III of 1994 on Foreign Trade**, the Council of Ministers Resolution No.

1053/1974. (X. 17) and the Decree of the Minister of Foreign Trade on its enforcement No. 7/1974 (X.17). In addition to these, depending on the nature of the contract, the rules of the Vienna Convention (23 July 1969, Vienna) which were enacted in Law Decree Nr. 12 of 1987 may apply.

These regulations are further supplemented by the specific rules of **Government Decree Nr. 17/1999 (II.5). on distance selling**. The regulations set forth in this Decree cover consumer contract but do not cover several areas such as financial, investment and insurance services, the transfer of real estate, and public auctions. The specific provisions include the duty to provide information about the content of the offer, more specifically information enabling the identification of the provider and the product, the duty to provide information on rescinding (cancelling) the contract, the enforcement of warranty claims, and the termination of a contract with a validity of a definite period of more than 1 year. It has to be noted that the scope of the Decree not only covers communication via electronic means, but is also applicable to consumer contracts.
According to the general rules of the Civil Code the contract between persons which are not present physically, is concluded when the acceptance of the offer reaches the offeror. (The acceptance of the offer will only constitute a contract if it does not contain any provisions that differ from the offer. If the acceptance constitutes a counter-offer, the original offer becomes ineffective.)

The determination of the date of the conclusion of the contract depends on the way the offer was made. More precisely, according to the Civil Code the contractual declaration in writing or by telegram becomes effective when it reaches the other party. Legal commentary supplements such rules by further specifications, i.e. between parties which are not present physically, the contract is concluded when the acceptance - which can be in a form of a letter, fax or telegram - reaches the offeror.

If the acceptance is in the form of an electronic message, the question under the Civil Code is what act constitutes a valid acceptance of the offer. One option is when the offeror first has an opportunity of accessing the message. Another option is to take the time when the message containing the acceptance first appears on the screen of the recipient's computer and this is acknowledged by an acceptance confirmation message by the sender. The European Union attempts to resolve this question in the directive in favour of the consumers. According to this, the provider is obliged to acknowledge the receipt of the acceptance of the offer by a return message. This way the party accepting the offer is able to prove the time and date when the offeror received the acceptance. Most probably Hungarian legislation will follow this principle.

According to Section 216 (1), unless otherwise regulated, a contract may be entered into orally, in writing or by conduct ("factum concludent"). The problem of proving that the contract was concluded by conduct might arise in E-Commerce, particularly if the contract has already been concluded by accepting the offer, but no performance has occurred.

Certain formal requirements contained in the Civil Code for the valid conclusion of a contract might raise problems in the field of E-Commerce.

According to Section 218 (1) of the Civil Code, if the law or the parties' agreement calls for a written form, at least a substantial part of the contract has to be in writing (extending to the

conclusion, modification and termination of the contract). In case the contracting party is unable or incapable of writing, the contract will only be valid if it is in a notarial form or in a form of a private deed with conclusive effect.

In case the law or parties' agreement requires written form for the validity of the contract, unless regulated otherwise, an agreement which was reached through an exchange of letters, telegrams or telex shall be considered as a contract concluded in writing according to Section 38 (2) of the Commentary of the Civil Code.

This is regulated in the same manner in the Decree on the Enforcement of Foreign Trade (Section 6). According to this Decree, all foreign trade agreements must be concluded in writing.

As a consequence, in the light of the abovementioned legal requirements, no formal requirement exists for parties that are not physically present that an original, signed document is needed for the validity of the contract, unless otherwise indicated by law or agreement of the parties.

As a matter of evidence however, the print-out of a mail message cannot be considered equivalent to a deed with conclusive effect if it does not contain the other party's signature. According to Section 38 of the Commentary of the Civil Code, if the document is prepared in several copies, the contract nevertheless becomes valid if each party only sign the copy prepared for the other party.

In a possible dispute, the Court will only consider print-outs of e-mail messages without a signature as evidence as part of its residuary discretionary power, and will only take it into account if it is a presumptive proof, containing all the essential elements of the contract, and can be shown to derive from the other party.

Prior to adopting a legal regulation on electronic signature and the acknowledgement of electronic documents which is expected to occur relatively soon in Hungary, considering the difficulties of evidence, also considering the complexity of the following effective regulations, it is advisable to conclude consumer contracts in writing as a private deed with conclusive effect (i.e. signed by both parties):

(a) The Decree on distance selling explicitly provides that a business is not entitled to demand performance by the consumer if it provides a service or sells goods which have not previously been ordered by the consumer. An example is the delivery of books or newspapers if the consumer does not explicitly returns a refusal notice that he/she does not want to have it delivered after receipt of an offer. According to the law, even if the consumer fails to make this statement, the presumption cannot be made that acceptance of the business organisation's offer has been made tacitly.

(b) In most consumer contracts the business has to obtain the consumer's explicit acknowledgement in order to use automatic dial system or telefax for the purpose of concluding a contract. Besides other rules, the **Government Decree on the Mandatory Provisions of the General Business Terms of Brokerage Companies Nr. 205/1996 (XII.23)** includes a duty to inform the investors in detail whether the brokerage company uses sound recorders to provide the service. Although in these cases it is the consumer who

usually bears responsibility for giving information that is false or unclear, this presumption can be rebutted in certain circumstances according to the general terms and conditions of the content providers.

(c) According to the Decree on distance selling, the business bears the burden of proof that it has fulfilled the duty of informing the client, and that it has conformed to all the regulations regarding time and has obtained the approval of the consumer that he intends to conclude the contract via telephone or telefax.

(d) In the area of consumer protection, it is to be noted that the business organisation bears the burden of proof that no provision of the general terms and conditions is unfair or unilateral, having regard to the fact that the signature of the consumer is missing in these cases as the law does not require it.

(e) If, according to existing legal regulations, a contract has to be concluded in writing as a formal requirement of validity, a contract which does not fulfill this requirement is void. Such contracts include e.g. real estate sales. According to Section 71 of the Act on Securities, contracts concluded between the brokerage company and the consumer must be confirmed in written form depending on how the general terms of business regulate this question.

Besides the difficulties in proving the content and the conclusion of contracts in electronic communication, the security of payment is one of the central problem areas of E-Commerce.

The **Government Decree No. 77/1999 (V. 28) on rules concerning the issue and use of electronic payment instruments** governs the following issues in accordance with the norms of the European Union: transfer of funds, cash withdrawals, i.e. transactions made via remote access payment instruments but not via electronic means and rules that are applicable to the contractual relationship between the holder of the electronic payment instrument and the issuer.

The most relevant rules regarding liability for the safety of the electronic payment transactions are as follows:

Both parties are obliged to keep records of secret passwords and codes which are needed for the use of the electronic payment instrument.

The contract has to include a clause to the effect that the holder has to notify the issuer or the institution mandated by him/her without delay after becoming aware of:

(i) The loss or theft the electronic payment instrument (loss of possession);

(ii) An unauthorised third person gaining access to the personal identification number or other code of the electronic payment instrument;

(iii) The recording on his/her bank account of any unauthorised transaction.

The issuer has to ensure that telecommunication means are available to enable the holder to make the abovementioned notification at any time on any day of the week. The Decree requires the issuer to keep records of each and every notification submitted by the holder for 5 years in an accurate and unalterable format which is suitable for evidencing the exact time of the notification and its content in an unalterable manner. The issuer is obliged to issue a record on the notification made by the holder which indicates the content and the time of the notification.

Up to the time of the notification, the holder bears the loss sustained, after notification the issuer bears the loss sustained. The issuer is not liable if he proves that the damage was due to the holder's gross negligent or willful breach of contract.

Pursuant to the Criminal Code, misuse of the bank card constitutes a criminal offence. The definition of the criminal act is in principle equivalent with the definition of the illegal or unauthorized use of the bank card, or the traditional means of acceptance of performance. Beyond the traditional means of use of a card, shopping via Internet is becoming more and more frequent, which means that in these cases the traditional use is unavailable. The reason is that in these cases the virtual business is based on the data of the bank card and not on its physical presence. Experts are capable of creating special software which might generate card numbers which are accepted by the safety program of the business and would cause the request or command to be admitted.

The issuers are trying to combat their strict liability on the issue of electronic money, which is in accordance with the regulation of European Union by introducing classification proceedings to increase the security and safety in electronic payment.

The Secure Electronic Transaction (SET) norm developed by Visa International and MasterCard in 1996 is the safest security system, although it is still used mostly in wholesale and resale trade. Essentially, payment execution takes place via an identification number issued by a financial service provider, therefore it does not require any distribution of credit card numbers. Furthermore, browser identifiers used for the purchase ("Certificates") identify the contracting parties prior to performance. A more widely used standard in today's Internet commerce is the SSL (Secure Socket Layer) standard. According to this standard, the browser used by the purchaser encodes customers' credit card data before transmitting it, in order to transmit it without illegal interference.

2.4 Liability of Internet Service providers

In general contractual relationships, the Internet Service provider is subject to a general civil law liability. As a telecommunications provider for public purposes, professional liability rests on him. Pursuant to Section 68 of the **Government Decree No. 218/1999. (XII. 28) on specific contraventions, telecommunication for public purposes** performed without permission is qualified as a contravention. Apart from this, the Internet provider is subject to criminal liability, if he commits certain criminal offences, which have been codified recently by amendment of he **Criminal Code (Act IV of 1978)**.[1]

[1] Section 177 Violation of Privacy, Section 177/A Illegitimate Data Handling, Section 177/B Misuse of Special Personal Data, Section 178/A Violation of Secrecy of Correspondence, Section 300 Infringement of Business Secret, Section 300/A Infringement of Bank Secret, Section 300/C Fraud

The obligation of the Internet provider as a telecommunication institution is defined in **Act LXXV of 1999 on Organised Crime and related incidences** and attached modifications which were incorporated into Act LXXII of 1992 on Telecommunications. According to Section 25, subsection 3 upon the investigative authority's "urgent matter" request telecommunications service providers shall disclose telecommunication related data from their files which are incidental to the case in question, even without the public prosecutor's approval as defined in a separate legal regulation. Similarly to the Directive "notice and take down" liability has NOT been introduced in Hungary.

2.5 Self-regulation, Speeding up the Dispute Resolution Process

Self-regulation

It is usual practice in Hungary that trade associations and chambers develop rules of professional ethics. It is expected that through similar self-regulation, so-called "Netikett" rules will be developed and accepted by online providers.

One pioneer example is the **Rules of the Council of Internet Service Providers ("Rules"), the Rules of Delegating and Registering Internet domains** under the .hu public domains, which is accessible via Internet at www.nic.hu homepage.

Dispute Resolution

In order to speed up assessment of rights in disputes, the legislator has already introduced the provisional injunction as a legal device **(Section 156 of Act III of 1952 on Civil Proceedings)**. Nevertheless, its application in practice is not convincing.

Act LXXI of 1994 on Arbitration regulates ad hoc and institutional arbitration in Hungary. The Permanent Arbitration Court of the Hungarian Chamber of Commerce and Industry was established on the basis of this Act, and is still operating. Additionally e.g., by virtue of Section 202 of the Securities Act, the Arbitration of the Stock Exchange was established.

In the practice of Internet dispute settlement in Hungary, the ad hoc arbitration, which is supported by the Council of Internet Service Providers, is currently under development. In disputes regarding .com, .net and org. domain registrations, one option of dispute settlement is an administrative settlement in accordance with the Policy rules.

In international disputes, the Law-Decree No. 13/1979 and the related conventions are applicable.

Committed with Computer, Section 329/A Infringement of Copyright or Neighbouring Right, Section 329/B Circumvention of Technological Measures For the Protection of Copyright and Neighbouring Right, Section 329/C Falsifying Data Relating to Copyright Management, 329/D Violation of Industrial Design Rights

FINAL THOUGHT

The aforesaid does not give an overall picture of contractual and non contractual legal regulation regarding developing legal relationships in E-Commerce. This article intends to emphasize the most relevant legal issues, which participants of E-Commerce might encounter. It is important to note, however, that the Hungarian Government is currently revising Hungarian laws in force to point out those areas where amendment of laws or the introduction of new regulations are necessary to promote e-commerce.

SUMMARY FROM THE TEXT OF RELEVANT LAWS:

- Act IV of 1959 on the Civil Code
- Government Decree Nr. 17/1999 (II. 5.) on Distance Selling
- Act III of 1994 on Foreign Trade
- Law-Decree 13/1979 on International Private Law
- Act LXXII of 1992 on Telecommunication
- Act LVIII of 1997 on Advertising
- Act LVII of 1996 on Prohibition of Unfair Market Conducts and Restriction of Competition
- Act CLV of 1997 on Consumer Protection
- Act LXIII of 1992 on Protection of Personal Data
- Act CXIX of 1995 on the Use of Name and Address Information Servicing the Purpose of Research and Direct Marketing purposes
- Copyright Act LXXVI of 1999
- Trademark Act XI of 1997
- Act CXII of 1996 on Credit Institutions...
- Act CXI of 1996 on Securities...
- Government Decree on the Mandatory Provisions of the General Business Terms of Brokerage Companies Nr. 205/1996 (XII.23)
- Government Decree Nr. 77/1999 (V. 28) on rules Concerning the Issue and Use of Electronic Payment Instruments
- Government Decree Nr. 218/1999. (XII. 28) on Specific Contraventions
- Act IV of 1978 on the Criminal Code
- Act LXXV of 1999 on Organised Crime and related incidences
- Act III of 1952 on Civil Proceedings
- Act LXXI of 1994 on Arbitration

Rules of the Council of Internet Service Providers ("Rules"), the Rules of Delegating and Registering Internet domains

For further information on this topic, please contact Dr. Judit Budai at Szecskay - Attorneys at Law by telephone (+36 (1) 472 - 3000) or by fax (+36 (1) 472 - 3001) or by e-mail (info@szecskay.com).