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Drafting E-legislation: Amendments to Existing Legislative Instruments or a New Information Society Act

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Introduction

This paper examines possible legislative techniques in the area of electronic commerce with particular regard to the means of implementing legal order of the European Union. A particular example studied in this paper is the legislative approach adopted in the Republic of Slovenia. The paper identifies the main problems with this approach and tries to put them into the context of the possible drafting techniques.

The first question every drafter with a particular task has to face is whether there is a need for creating a wholly new statutory document. If there is no such need, the drafting process will be limited to preparing amendments to legislative instruments already in force. The choice between the two options will normally depend on the nature of the required changes. Regulation of an entirely new industry, for example, will typically require introduction of a wholly new statute. Similarly, introduction of complex measures in one specific field, e.g. protection of consumers, may also be accomplished by an entirely new piece of legislation. On the other hand, improvements of the regulatory measures or procedures already in place will usually be dealt with by amendments to existing statutes. A further factor that should be taken into account when discussing the choice between the two options is legal tradition of the country in question: continental legal systems mainly depend on ‘codes’, broad and comprehensive statutes dealing with traditional areas of law. Accordingly, countries with continental legal tradition tend to include new rules into the existing codes and may be in general more reluctant to introducing new pieces of legislation. Common law countries, on the other hand, tend to have more pragmatic attitude towards the legislative process and may be more open for entirely new pieces of legislation.

In the area of e-commerce, there are basically two causes for additional or different legal regulation: the emergence of a new industry of electronic commerce and the introduction of electronic means into the traditional course of trade and business. In the initial phase, the drafters of the e-legislation dealt exclusively with the second cause. Before the emergence of the World Wide Web as an entirely new virtual marketplace and social environment, lawyers needed only to worry about adapting existing legal rules so that information that requires legal effect may also be sent in the electronic form. Later on, however, entirely new commercial and social patterns and practices emerged, requiring a fundamentally different regulatory approach. The issue was no longer simply bridging the gap between the law and the commercial reality but rather creating a new law for a new environment.

Several countries have faced or still have to face the issue of drafting their legislative responses to the mentioned issues raised by e-commerce. Various models of drafting have been adopted but the prevailing solution seems to be the adoption of a specialised e-commerce act. As experiences show, this may not always be the optimal solution: some e-rules are better dealt with in the context of existing codified law. In this paper, we will try to find the appropriate balance between the two options

What types of rules do we need?

In order to find the most appropriate legislative technique, one should first look at the types of rules required by the technological and social change caused by the Internet. As already mentioned above, the emergence of the need for new rules in the area of e-commerce is driven by two factors: the use of new technologies in traditional areas of commerce and the emergence of a wholly new electronic marketplace. According to this division, two main types of rules can be identified.

Rules of the first type serve as an interface between e-commercial practices and traditional areas of law such as contract law, property law or administrative law. These rules fall within the scope of the functional equivalent approach as adopted by the UNCITRAL Model Law on Electronic Commerce. [1] These rules refer to the legal validity of electronic messages, conclusion of contracts via electronic communications networks, issuing of transport documents in electronic form etc. We shall refer to these rules as ‘the interface rules’ as they generally do not seek to establish new standards of behaviour but mainly just help us to overcome the trouble with the existing law. US Uniform Electronic Transactions Act, for example, is a comprehensive collection of the interface rules.[2]

Rules of the second type are, on the contrary, sui generis rules for information society services. These rules refer to behaviour on the electronic marketplace, liability of information society service providers acting as intermediaries, and regulation of new entities such as certification authorities. We shall refer to these rules as ‘the sui generis rules’, as they are imposing on the e-business community completely new standards of behaviour that are not imposed on actors outside the electronic ‘stage’.

[3] Expect for Article 9, EC Directive 2000/31/EC on electronic commerce consists exclusively of the sui generis rules.

It should be observed, however, that some rules are not easily classified as falling into one of the two mentioned categories. Rules of the US Uniform Computer Information Transactions Act governing contracts involving computer information, for example, may be seen both as rules adapting contract law to trading with information or as rules regulating the new information society marketplace. Due to their substantive nature, however, it is more appropriate to classify them as sui generis rules.

Possible drafting solutions for various types of rules

According to the identified e-commerce issues and various types of rules, one can identify the following basic legislative options:

1) One complete Information Society Code. Legislative instruments already in place are left completely intact, whereas all rules concerning e-commerce are dealt with in a separate act.[4] The positive side of this approach is that all rules concerning the new industry of e-commerce are collected in one comprehensive document, making it much easier for the businesses to adapt to the laws in force. This would particularly be the case with small businesses that are not able to afford expensive legal consulting but are happy to be able to rely on one code. However, separate existence of the interface rules may be misleading as this may lead an unaware reader to believe that these rules form a special contract law for the e-environment. Clearly, this is not the case: the interface rules only exist in the context of other bodies of law such as contract law. On the other hand, this technique seems to be ideal for the sui generis rules: since these rules seek to establish a wholly new framework for the information society services, this framework should be contained in a document of its own.

2) Amendments only. Every rule affecting e-commerce is incorporated into statutory legislation already in place in the traditional areas of law (contract law, copyright law, media law, administrative law etc.) and no special new act regulating information society services is passed. [5] This technique may be especially desired in the continental systems based on codification governing traditional areas of law. As a consequence, any changes to these traditional areas of law should be effected by amending the code in order to maintain the coherence of the system. Moreover, this technique may be ideal for the interface rules. As the interface rules deal mainly with translating the rules that are already there into the language of information society, they can mostly be included into the existing body of legislation. However, this technique ignores the emergence of a new e-commerce industry and of a new e-marketplace that require regulation which cannot always be fitted into traditional areas of law such as e.g. media law.

3) Combined approach. The interface rules are dealt with by amendments to statutes already in place, whereas a new act is passed to incorporate the sui generis rules. This solution seems to overcome

the problems with one or the other of the two above options. An example can be found in the German legal system. Whereas several pieces of German legislation, including the Civil Code (BGB), have been amended to fit both the technological changes and the EU directives, new pieces of legislation such as the Teleservices Act (TDG) have also been introduced where appropriate.[6]

Legislative experience in the Republic of Slovenia

The Republic of Slovenia also adopted a type of combined approach. This approach, however, differed from the optimal combined approach in the sense that it failed to recognise the difference between the interface and the sui generis rules. Accordingly, the laws are not sufficiently transparent, whereas a comprehensive statute regulating the e-commerce industry is still missing.

EU Directives governing electronic commerce were meant to be implemented by two new pieces of legislation: the Electronic Transactions and Electronic Signature Act (ZEPEP), a wholly new statute created to govern the area of electronic commerce, and an amendment act to the Consumer Protection Act (ZVPot). Furthermore, the new Administrative Procedure Act (ZUP) provided for the electronic filing option in administrative procedures. In addition, the new Payment Transactions Act (ZPlaP) introduced regulation in the area of electronic money issuing.

Particularly the drafters of ZEPEP committed several errors as they failed to foresee the connections between the new interface rules of ZEPEP and the legislation already in place. The first part of ZEPEP (which is not much more than a selective translation of the UNCITRAL Model Law on Electronic Commerce) was supposed to act as a universal functional equivalent tool affecting both private and public law. However, as a consequence of this approach, the provisions of ZEPEP were not sufficiently adapted to domestic law, contract law and administrative law in particular, which prevented the act from efficiently performing its function.

For example, ZEPEP sets rules as to when a message is deemed to have been be ‘sent’. However, neither the Obligations Code nor the Administrative Procedure Act attach any legal consequences to the fact that a message has been ‘sent’. Slovenian contract law strictly relies on the ‘reception’ theory, whereas the fact that a message has been ‘sent’ is not relevant for administrative procedure either unless there is proof of sending provided by the Post Office.[7]

On the other hand, provisions of ZEPEP defining receipt of messages reach to the very core of the contract law ‘reception theory’ but are not sufficiently precise to overcome legal uncertainty. Consequently, the basic question whether an email should reach the recipient’s server or his or her home computer in order to be deemed ‘received’ remains unsolved.[8]

A further problems is posed by the fact that ZEPEP completely ignores the terminology of contract

law: its provisions on electronic agents refer to 'origination' of messages but fail to refer to the essential contract law institute of 'declaration of will'. Accordingly, there is still doubt whether contract may be validly concluded without human intervention under the laws of Slovenia.

Independently from ZEPEP, the drafters responsible for the area of consumer protection have included the Directive 2000/31/EC provisions dealing with protection of users of services into ZVPot, thereby preventing these provisions from affecting business-to-business transactions. The drafters seem to have overlooked the circumstance that the provisions of the Directive 2000/31/EC dealing with protection of users of services apply not only to business-to-consumer but also to business-to-business transactions unless agreed otherwise by the parties. The only possible remedy for this situation is adding an appropriate reference into the statute regulating business-to-business electronic commerce (most likely amended ZEPEP) which would, however, make the legislation hardly transparent.

To conclude, the drafters have not taken an appropriate approach. On one hand, they have introduced a special act consisting of the interface rules that lacked clear connections to the existing body of law. On the other hand, they have tried to fit the sui generis rules of the Directive 2000/31/EC into the limited framework of consumer protection. It would have clearly been much more efficient to separately amend the Obligations Code and the Administrative Procedure Act with some necessary well-drafted provisions, whereas the necessary sui generis rules of the Directive 2000/31/EC would be contained in a separate statute regulating the e-commerce industry such as ZEPEP.

The lesson from Slovenia seems to be that the drafters need to take into account the consistency of the legal system and the nature of the rules they are implementing. If the drafters had identified the existing rules before having created the e-interfaces for them, the provisions of ZEPEP would have probably been drafted better. Of course, this can only be done if one is able to distinguish between the sui generis and the interface rules.

Possible obstacles for optimal solutions

Having found out that optimal solutions are not necessarily in place in all the countries, one should look at the possible obstacles for implementing first-best solutions.
First of all, the legislators may not be completely aware of the meaning of the rules in the context of their own domestic legal system. One should bear in mind that e-rules implemented in most countries are mainly derived from international documents such as the UNCITRAL Model Law on Electronic Commerce or certain legal documents originating from the e-commerce superpowers such as the US or the EU. Accordingly, the drafters may actually believe (which seemed to be the case in the Republic of Slovenia) that the internationally recognised interface rules are sufficiently universal that it is not necessary to take into account the particularities of domestic legal systems when implementing them. As for the ZEPEP, the drafters even declared that the act affected all the areas of

private and public law without actually establishing what this effect may and should be.

The limitation of the drafters' powers poses another problem. Many countries established specialised ministries or agencies for information society or e-commerce. However, these bodies may have little or no impact on the opinion of bodies such as ministries of justice that are responsible for drafting private law in general. Accordingly, it may be easier for the drafters to propose a special act presumably affecting only their own field of jurisdiction and leaving main statutes in the area of private law intact. This is, of course, wrong. The interface rules should primarily be dealt with by the people who are responsible for the existing body of legislation. Especially in the area of private law, both learned scholars and practitioners should be consulted before introducing them.

Moreover, the politicians, the business community and the general public may see the passing of an 'Electronic Commerce Act' as 'fashionable'. In this respect, the content of the act could be of secondary importance: the state officials may be sufficiently satisfied with the fact that the country has passed an act on electronic commerce. ZEPEP, for instance, was considered to be an important step forward by some engineers and e-business people. These people, however, had no particular knowledge in law and their opinion only referred to the fact that the act was there, without really knowing what it was about.

Furthermore, confusing issues of e-commerce with the ones of e-government may pose a further danger for efficient drafting. The drafters of ZEPEP, for example, hardly addressed the issue of facilitating e-commerce but rather relied on fostering governmental activities in the area of information society. Accordingly, regulation introduced for the area of commercial communication in electronic form was more or less a by-product of the electronic signature certification system that ZEPEP established primarily for the needs of the governmental agencies. As such, this regulation failed to fully address the actual obstacles for electronic trading in the relevant legislation already in place.

The impact of convergence

Another factor that should be taken into account when drafting information society legislation is convergence. One should not overlook the fact that information society service providers at the same time often act as providers of telecommunications i. e. electronic communications services. Furthermore, issues such as liability of service providers or communications privacy similarly affect both types of service providers.

Despite the formal division between conveyance and content in the EU law, electronic communications service providers are involved in information society services to the extend that makes it increasingly difficult to distinguish between the two activities. Moreover, technologically more neutral wording of the new EU electronic communications regulatory framework makes it

much easier to establish links between the two areas of regulation.

Accordingly, the drafters could take convergence of services into account when creating laws regulating information society services. One possibility is to create a single 'Information- and Communications Services Code' that would include provisions both for information society- and electronic communications services. Again, as this statute would be based on the emergence of a new industry and new markets, it should primarily deal with the sui generis rules.

The idea of a single 'Information- and Communications Services Code' may be particularly welcome in countries like Slovenia that are at the same time facing the reforms of both e-commerce and telecommunications statutes. Furthermore, as far as Slovenian information- and communications services market is concerned, a single code would be consistent with the fact that electronic communications service providers are getting increasingly involved in offering content services. Mobitel, the largest mobile operator in the country, has recently launched a new information portal service, whereas SiOL, the largest Internet Service Provider, is preparing to offer streaming video via ADSL while already running an extensive Web based portal.

Conclusion

When drafting e-legislation, one should observe not only the content of the rules but also the coherence and consistency of the legal system. The later two elements can only be preserved by appropriately choosing the legislative technique. At the end of the day, every piece of private or public law legislation should be drafted to function seamlessly in both 'physical' and virtual environments. Therefore, the interface rules should in the long run become fully merged with the rest of the private or public law.

On the other hand, as long as separate e-industries and e-markets continue to exist, they may require special legal treatment and regulation in the form of sui generis information society statutes. In addition, one should consider that fact that the industry of e-commerce has to a high extent become merged with the telecommunications industry. If there is sufficient ground to believe that there is actually one information- and communications industry, this may also be sufficient ground to introduce a single 'Information- and Communications Services Code'.

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[1] See Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce (1996).
[2] See Prefatory Note to the Uniform Electronic Transactions Act (1999).

[3] Compare Reed, C. (2000): Internet Law: Text and Materials, Butterworths, London, Chapter 4.
[4] See Domolki, B.: ICT in Hungary: Institutions, Regulations, Challenges and Applications in Academia, Industry and the Public Sector. www.ifip.or.at/it_star/report_hungary.pdf.
[5] See supra.
[6] See Implementation of the E-Commerce Directive – status as 17 January 2002, www.ecomlex.com See also French approach described in Fauchoux, V.(2002): Internet and e-commerce law in Europe , Deprez Dian Guignot, www.en-droit.com/intellex/fiches/ conference_internet_and_e-commerce.pdf.
[7] Makarovic, B.; Klemencic, G.; Klobucar, T.; Bogataj, M.; Pahor, D. (2001): Internet in pravo - izbrane teme s komentarjem Zakona o elektronskem poslovanju in elektronskem podpisu, Zalozba Pasadena, Ljubljana, Commentary of Article 9 ZEPEP.
[8] Compare much more precise provision of S. 15 of the US Uniform Electronic Transactions Act (1999).