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The Legal Concepts of Online Commerce

Preface

In the contemporary social sciences, many concepts are distinguished by trying to formulate, as much as possible, a characterization of modern societies: post-industrial society, mass society, consumer society, global society and the information society. I would like to draw attention to the latter two sociological models. Global society, otherwise known as the global village - is the concept of today's society in which increasingly more advanced, more common and faster methods of communication eliminate geographical, political, national, language barriers etc. The information society - a society where information is treated as a commodity - is created („produced”) and distributed („sold”) on a massive scale and is a source of profit for its „producers” and „distributors” (i.e. simply the media). The common denominator of both these visions is the mass media, among which the Internet currently reigns. Its name alone is an abbreviation of the term International Network. Currently, it is the strongest bond of global society, as well as a peculiar expression of the technologized and computerized nature of our civilization. The worldwide network of computers allows us to reduce the effort and time needed to achieve the assumed result, which can happen everywhere - even on the opposite side of the Earth. The power of the Internet lies largely in its dynamics and detachment from reality. These features pose serious challenges to legal regimes governing the issue of electronic trading/commerce (e-commerce). The swift pace of development in this relatively young branch of legal and economic turnover is illustrated by the following data. In 2012, the estimated value of the global market in this industry exceeded \$ 1 trillion, an increase of 21.1% compared to 2011. In 2013, the estimated value of the global e-commerce market reached 1.3 trillion. The United States, China and the EEA have the largest share in the creation of global e-commerce (and within the latter, the majority of the turnover is generated by: Germany, Great Britain, France, Italy, Spain, Scandinavian countries and the Netherlands). The Chinese market is characterized by the highest average dynamics

of annual growth and the largest absolute number of real and potential consumers (in 2012, more than 220 million Chinese people made online purchases).¹ These statistics clearly show the global trend of the electronic market boom. In the doctrine of civil law - both substantive and procedural - this leaves many vague and contentious issues to be explained, such as: general ideas about the concept of regulation, the identification of contractor of contracts concluded on the Internet, issues related to defects of declarations of will, especially in the face of new technological ways to submit them, etc. Due to the extremely dynamic but also quite stable trend of e-commerce growth and broad prospects for its development, it is rightly predicted that it will continue to grow in importance for the economy - both domestically and internationally. Therefore, there is a huge challenge facing the legal sciences all over the world - the regulation of the International Network, which is a virtual entity, but still has a huge impact on the real world.

Practical Legal Problems of the Internet

Although it is easy to identify the differences between reality and cyberspace, it is harder to find contact points between the two fields of activity of modern humans. One of the tendencies uniting both these „worlds” is the increasingly frequent use of the Internet to perform conventional legal acts.² The aforementioned qualities of the global network - its dynamics, virtuality, speed, universality, affordability, relative ease of use - undoubtedly encourage people to undertake such procedures, but at the same time create various material and formal legal hazards. First of all, they provoke factual states in which the party to the legal relationship aims to annul the declarations of will that they made. The ease of submitting declarations of will by means of user interfaces contributes to the creation of so-called errors in entering data. The anonymous nature of Internet relations is a strong temptation for unreliable, dishonest and disloyal Internet users. The practices they use, such as manipulating data in order to make the product or service is attractive to potential contractors, may lead to an erroneous idea as to the subject of the legal action.³ It is not an uncommon practice to provide so-called blind links, or interface connections, in order to lead the other party to misinterpret the idea of a relationship between the site administrator and a well-known and trustworthy entrepreneur with an established position in the market. The source of the mistake may also be an error,⁴ i.e. a misperception of a declarer of will about the content of their declaration of will.

1 Sources of statistics: The 2015 Global Retail E-Commerce Index™; www.e-commerce-europe.eu; www.ideal.pl.

2 As indicated by the statistics quoted above.

3 Latin: *error in corpore*.

4 Mistake of the *sensu largo*.

These are just some examples of various dangers to the durability of legal relationships concluded over the internet. Of course, the current reality even requires cataloging and describing such situations. I suggest here that reflection on the error should be divided into the following categories, based on the type of situation and the potential source of a normative momentary error relating to this situation:

- actual states caused by unreliable, dishonest or disloyal behavior of the participants in online trading;
- actual states caused by the lack of due diligence by trading participants;
- actual states caused by unnecessary or undesirable interference by third parties;
- actual states resulting from irregularities in data transmission in the network.

The problematic issues cited should be considered mainly from the perspective of one of the most common weaknesses of the declaration of will, namely the institution of error, regulated in Art. 84 of the CC.⁵ Areas of interest should also include: a qualified error form, i.e. a deception,⁶ distortion of a statement caused by a messenger,⁷ the issue of netiquette and technical standardization in relation to legal and non-legal norms, the role of general clauses in the interpretation of Internet users' behavior in terms of error and the burden of proof in proving an error in submitting online statements. Corresponding to the error, the institutions operate outside of Germany in the German Bürgerliches Gesetzbuch,⁸ the Swiss Code of Obligations,⁹ the French Code Civil,¹⁰ the Italian Civil Code,¹¹ and the Austrian Civil Code - Allgemeine Bürgerliches Gesetzbuch,¹² Principles of European Contract Law,¹³ and UNIDROIT.¹⁴

The Main Concepts of the Legal, Political and Administrative Regulation of the Internet: Presentation, Comparison, Advantages, Disadvantages

The first problem faced by the legislator in attempting to regulate e-commerce is choosing the right level of legislation. The global reach of the Internet and the inability to localize the submission of a declaration of will, which often happens in practice, obviously speaks

5 The Polish Act of 23 April 1964 - Civil Code (Dz.U. 1964 no. 16 item 93).

6 Art. 86 of the CC.

7 Art. 85 of the CC.

8 Art. of the 119 BGB.

9 Art. 25 of the CoO.

10 Art. 1110.

11 Art. 1428 and § 871.

12 § 871 of the ABGB.

13 Art. 4: 103 [2].

14 Art. 3.5-1a.

for international and even transatlantic law-making solutions in these matters. The problem is that the Internet and online reality is usually very dynamic, spontaneous and unpredictable, while law and international relations are inherently rather static and conservative, more likely to lead to slow evolution or even stabilization (not to mention stagnation) rather than to rapid revolution or reforms. That's why traditional inter-state customs and consents are not enough here. The discussion on the legal regulation of the Internet has a global reach and so far three main positions have crystallized within it. Proponents of the first one treat the Internet as a „new quality” - a unique, independent scientific-technological, cultural and civilizational phenomenon, whose most important features are: pluralism, liberalism, democratism and universalism. They believe that the global network should not be subject to any regulation. This concept is known as the no-law Internet.¹⁵ I think that entities using the benefits of cyberspace are a kind of society that, like any other, needs legal norms to satisfy one of the basic needs of its members - security, stability and certainty regarding tomorrow. Leaving the Internet unchecked would only be acceptable by making the (*notabene* naive) assumption that every participant in e-commerce is honest and reliable, and that the informal and unwritten ethical rules and customs of virtual communities (e.g. netiquette) are sufficient to protect the interests of Internet users. It seems obvious that the consequence of basing the Internet on the idea of no-law Internet would lead to anarchy, its criminalization and, as a result, the distortion or disappearance of its socio-economical functions, which, of course, cannot be allowed. Therefore, a second concept seems to be more realistic, the representatives of which consider it impossible to apply the law regulating traditional relations to relations established by electronic means of remote communication. Therefore, they postulate the creation of a separate law of cyberspace, on the basis of a supranational consensus.¹⁶ The postulate to create a separate global cyberspace law seems to be much more rational than the first concept. A uniform legal system would solve a significant problem, which is establishing an appropriate law and the court for legal relations arising in cyberspace. But even with the assumption of the best will, knowledge and competence on the part of entities of international law, there is a real threat that the process of amending (or rather „updating”) the law of cyberspace would be too slow and extended in time.¹⁷ History teaches, however, that the development of multilateral consent

15 Such striving for extreme liberalization of the Internet law, especially in the field of copyright and related rights, led in Sweden to the creation of a political party called Piratpartiet - Pirate Party. The ideology, program and political discourse of this grouping were based on the liberalization and deregulation of the online environment. The party has already gained significant influence - in the EP elections of June 7, 2009 it gained over 7% support.

16 “Internet as a separate legal system”.

17 Problems related to the ratification of international agreements on the cross-border regulation of e-commerce are illustrated by the example of the UNCITRAL model e-commerce act. Convention websites: http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention_status.html.

and compromise in the international arena is not an easy task, and this would additionally hinder the legislative process. It seems that in order to effectively implement the postulates of representatives of this idea of regulation, it would be necessary to create a specialized, supranational institution dealing with the normative regulation of electronic trading law. In my opinion, the real functioning of this concept would require establishing an institution of competence to regulate electronic trading, because the dynamic nature of technologies and phenomena related to electronic trading requires quick reactions to changes. Against the concept of Internet as a separate jurisdiction, A. Stosio rightly puts forward the argument: „Creating a cyberspace law would also mean granting cyberspace the status of a new reality for which traditional legal orders are not enough.” It is emphasized that cyberspace should not be artificially detached from reality, because despite its separateness, the traditional law is flexible enough that it can, after necessary modifications, satisfy the legal questions arising from various problems associated with the network functioning in a satisfactory manner. It cannot be ruled out that this concept will be applicable in the future, in connection with which it is expected that in the coming decades, the institution referred to above will be created. As of today, this concept seems unrealistic, as well as unnecessary, because the effective regulation of cyberspace can be accomplished by implementing the postulates of advocates of the third concept. This one - the most conservative one - is based on the application of existing legislative methods to regulate cyberspace. It emphasizes the need to take into account the specificity of electronic trading.¹⁸ The electronic marketing law should be a kind of superstructure in relation to traditional legal regulations, established only in situations where the interpretation of existing provisions does not provide sufficient protection for its participants. This concept also ensures the quickest response of legislation to changes. This concept is currently dominant in doctrine and therefore I intend the further course of this work to be based on it. Only the cross-border nature of the network remains a problem.

Other Concepts of Internet Regulation

There is also an alternative division of the concept of internet regulation and legal trading within it, which is, however, less prominent in the discourse. The idea of self-regulation was to entrust the regulation of turnover in whole to private law entities. It was particularly popular among pioneers of the Internet as a medium, who saw it as a compromise in disputes about the need and scope of comprehensive regulation of e-commerce. Its essence was taken by D. D. Clark:

¹⁸ This process is called “translation”.

We Reject Kings, Presidents and Voting.
We Believe in the Rough Consent and Running Code

Although currently the concept is not presented in its radical form (due to its dissonance with the current dynamic development of the commercial network), it has become the starting point for many other models in the law of new technologies. Its milder form is the idea of self-regulation, which promotes the bottom-up and voluntary creation of standards by entities involved in a specific activity. The legal rules created in this way are in fact the standards of soft law proceedings, and the scope of their normalization and application applies only to a specific group of entities, e.g. entities providing services from the same or related industries, etc. Of course, the latter feature of the type of regulations excludes the universal scope of their validity. The doctrine indicates three functions of self-regulation: regulatory, supervisory and pertaining to sanction. These functions are carried out mainly through the development of codes of conduct, usually reflecting the deontological norms of a given regulatory group. An example of top-down support of this type of action is Directive 2000/31/EC on electronic commerce, Art 8 sec. 2, which imposes on the Member States and the European Commission (EC) the obligation to urge professional associations and organizations to develop such codes at the Community level, while respecting the autonomy of these associations. An auxiliary regulation in this respect is contained in Art. 16 of the above directive. According to this, the Member States and the EC support:

- the development by trade, professional and consumer associations and organizations - codes of conduct at the Community level, aimed at the proper implementation of the directive's provisions;
- the voluntary submission of draft codes of conduct to the Commission at the national or Community level;
- the availability of codes of conduct in the official Community languages, by electronic means;
- providing the Member States and the Commission with the aforementioned associations and organizations - evaluations regarding the use of such codes and their impact on the practice and customs of e-commerce;
- (as a last resort) the development of codes of conduct on the protection of minors and human dignity.

The literature argues that autoregulation is fraught with significant disadvantages related to the nature of the creation of the law and the scope of its application. Indeed, consumers may be left out of the scope of protection, and the balance between trading participants may not necessarily be maintained. However, hybrid solutions are proposed, i.e. combining bottom-up governance and top-down governance, especially in so-called sensitive fields, such as the protection of personal data, protection of consumer rights and interests, and intellectual

property. Finally, it should be pointed out that the specificity of self-regulation prompts the conclusion that this form of regulatory approach to relations more closely meets the conditions, goals and needs of B2B relations than others, in particular B2C. However, the actions taken by the EU in practice correspond rather to the third concept - coregulation. This involves the cooperation of private entities that formulate rules of conduct, and public authorities that sanction such regulations. This is expressed in the form of the eEurope initiative,¹⁹ and more recently in the form of the Digital Agenda for Europe 2010–2020, which provides for the creation of a European code of online rights.

Concepts and Definitions of the Internet, High-Tech Law and Electronic Trading

When analyzing the changes and tendencies taking place in recent years in the field of the Internet and e-commerce, important processes, especially those caused by technological innovations, have become visible, which - affecting the economy - led to economic changes in the commercial use of this global medium. The Internet, mobile communication and other on-line technologies initiating economic changes contributed to the emergence of the New Economy concept to define economic processes related to e-commerce. But for the comprehensive characterization of the New Economy it is not enough to say that it is a transfer of commercial relations to online exchange. The doctrine mentions the following basic features:

- detachment from time, place and cost of production - *on-line* information is global, available at any time and place, and often free of charge, which ensures an unprecedented level of transparency of the market;
- demonopolizing - this term means that thanks to the Internet new opportunities for competition have been created, and the barriers to entry are much lower than in the case of the Old Economy,²⁰ thanks to which companies of different sizes can compete with each other; the removal of some levels of intermediaries between market participants²¹ and the creation of others²² - the first of these processes, as a feature of the digital economy, results from the characteristic structure and forms

19 Under which eEurope - an Information Society for All documents from 1999 were developed, eEurope + Action Plan from 2000, eEurope 2002 Action Plan, eEurope 2005 and finally the i2010 initiative - A European Information Society for growth and employment, which is also the implementation of the Lisbon Strategy).

20 The traditional economy.

21 Disintermediation.

22 Reintermediation.

of relations, e.g. B2B,²³ B2C,²⁴ C2C,²⁵ C2A,²⁶ which allow direct contact between the parties to the transaction; the second one of these processes consists in the parallel emergence of other levels of the location of exchange agents and the new nature of their activities, such as electronic markets, portals and brokers;

- reverse economy²⁷ and reverse marketing - phenomena resulting from the fact that the Internet has created new business models that reverse the individual elements of the traditional economy (Old Economy), and in particular the burden of negotiating and submitting bids;
- the individualization of legal relations - enables the individualization, precision and uniqueness of the offer to be provided, in a way previously unheard, of thanks to the possibilities of in-depth analysis of the behavior of individual network users.

Concepts and Definitions of Electronic Commerce and Online Commerce

The aforementioned features became the basis for the development of the concept of electronic commerce.²⁸ But this term does not have a general normative definition and is not uniformly taught in doctrine. For some authors, e-commerce is the sum of all transactions that participants make electronically, which is why it goes beyond the traditional scope of the term „trade”. Others show that the concept of e-commerce covers advertising activities, the sales and distribution of products via ICT networks, including primarily via the Internet. As part of the OECD's²⁹ activity, two definitions of e-commerce have been distinguished: a narrow one - covering only transactions carried out via the Internet and a wide one - treating all exchanges of goods and services electronically (hence the distinction between the terms „online commerce” and „electronic commerce”). In the Anglo-Saxon doctrine, R. Clark points out that e-commerce is a commercial or service activity using telecommunications tools *sensu stricto*, or at least based on telecommunications. A. R. Lodder suggests, however, that e-commerce should be defined as any commercial transaction regarding goods or services, including commercial activities relating to them, in which the participants are not in the same place at the same time and communicate with each other electronically. In the Polish doctrine,

23 Business-to-business relationships.

24 Business-to-consumer relationships.

25 Consumer-to-consumer relationships.

26 Consumer-to-administration relationships.

27 Inverted economy.

28 In brief: e-commerce.

29 OECD - *Organisation for Economic Co-operation and Development*, French: *Organisation de coopération et de développement économiques*, OCDE.

K. Kowalik-Bańczyk represents the position according to which e-commerce is defined as a wide range of activities - such as the sales of goods, delivery of products and services on-line, electronic fees and bills of lading, conducting tenders and after-sales service - made using electronic communication and a communication tool. It is worth noting that a broad understanding of the concept of electronic commerce also appears in documents prepared under the UNCITRAL system. It was emphasized that transactions in international trade made via electronic data exchange and other means of communication are referred to as the e-commerce, which involves the use of methods of communication and the storage of information that are an alternative to paper. It is also worth pointing out that the doctrine distinguishes two different forms of the e-commerce. The first one includes commercial relations, which are carried out partly via electronic means, and partly conventionally/traditionally - through indirect electronic commerce.³⁰ An example of this is the combination of ordering goods online with their delivery via traditional mail. Currently, the second form of the e-commerce is becoming more and more common, allowing for the execution of the entire obligation electronically, i.e. consisting not only of concluding the contract electronically, but also for the performance of this contract through direct e-commerce.³¹ This applies in particular to the exchange of music files, e-books, subscriptions to magazines and newspapers, ticket reservations, video on demand,³² etc. In terms of the subject configuration of legal relationships, the following types of e-commerce can be distinguished:

- B2B (business-to-business, entrepreneur-entrepreneur relations) - bilateral professional relations, currently dominant on the Internet, implemented, for example, based on auction or distribution auction systems (reverse auction), brokerage systems and transaction platforms;
- B2C (business-to-consumer, entrepreneur-consumer relations) - unilaterally professional or semi-professional relations, i.e. those in which the consumer is understood as a natural person working for purposes that do not fall within his professional, business or commercial activities; sometimes also include so-called mixed contracts (removed contracts), which are concluded by the consumer for semi-private and consumer purposes, and partly professional, economic or commercial - with a clear superiority or superiority of the former in relation to the latter; primarily such relations concern the operation of on-line stores and auction portals - in the case of a virtual shopper;
- B2A (business-to-administration, entrepreneur-administration relations, also referred to as B2G - business-to-government, entrepreneur-government relations) -

30 Indirect e-commerce, German: *unechter E-commerce*.

31 Direct e-commerce, German: *echter E-commerce*.

32 In brief: VoD.

- a shortcut used to determine the entirety of an entrepreneur's contacts with representatives of public authorities;
- B2E (business-to-employee relations, entrepreneur-employee relations) - relations between the employer and the employee, performed on the basis of electronic platforms;
 - C2C (consumer-to-consumer, consumer-consumer relation) - bilateral consumer relations - platforms specializing in their implementation include auction systems, e.g. e-Bay.com, allegro.pl or gumtree.pl;
 - C2A (consumer-to-administration, consumer-administration relations) - an abbreviation used to determine the entirety of contacts between citizens (and at the same time potential entrepreneurs and consumers) and representatives of public authorities;
 - A2B/C/A (administration-to-business/-consumer/-administration, relations administration-entrepreneur/-consumer/-administration) - relations referred to as e-Government or e-administration, consisting in the transformation of the „paper” administration into „virtual”, at the base of which lies the idea of modifying government or self-government administration, on the assumption that this is more friendly or accessible to citizens or entrepreneurs (with different criteria for this friendliness or affordability, e.g. the European Code of Good Administration - ECGA).

In the literature on the subject since the technical development of the Internet, three features of fundamental importance in the legal sphere - intangibility, interactivity and globality - are pointed out. This „catalog” is sometimes extended to include the extraterritoriality, multifunctionality, universality, multi-jurisdictionality and anonymity of users. However, this requires emphasizing that the above-mentioned properties of the world network are primarily associated with technical assumptions at the core of its functioning, which not only conditioned its creation, but most of all enabled the development of electronic commerce on a global scale.

A General Outline of Doctrinal Views

The first specific issue that deserves attention and discussion in this paper is the attempt to define the term „electronic trading”. Considerations on this topic in Poland entered an advanced stage with the spread of electronic communication in the 1990s. Despite the passage of time, the wording and understanding of the key concepts of electronic trading law have not been clearly defined. The literature presents different ideas regarding the naming of the legal area of interest to us. The names presented in the literature are: „electronic marketing law”, „electronic law”, „electronic communication law”, „in-

ternet/online law”, „cyberspace law”, „digital law”, „network law information”, or, finally, „electronic/online commerce law”. The scope of the aforementioned terms is currently inaccurate and therefore extremely fluid. In the doctrine, researchers assign them diverse meanings and functions, often subordinating them to the immediate goals, tasks and the needs of their scientific work. The studies I dealt with are dominated by the term „electronic trading law”, hence I will use it in this paper. Personally, I think it’s the most accurate term. The *ratio legis* of the distinction of electronic trading among other areas of legal regulations results from discrepancies between traditional legal activities and those concluded in electronic form. J. Janowski lists the problems arising from this background, which include:

- the principles of expressing and interpreting declarations of will, submitting offers and concluding contracts by electronic means;
- the information obligations of entrepreneurs who make an offer to conclude contracts by electronic means;
- the protection of consumer interests against unfair commercial and marketing practices on the Internet;
- respect for the privacy of the individual on the Internet, including the protection of his or her personal data;

The distinguishing feature of legal transactions carried out by electronic means of remote communication is the lack of direct contact between one party to the contract with its contractor or product at the time the contract is concluded. This in turn may lead to temptations and opportunities to abuse among unreliable, dishonest or disloyal contractors. Further arguments that justify the separation of the category of electronic trading - as a *sui generis* turnover - are:

- the ease of concluding a contract using the user interface (this primarily concerns innovative technical ways of entering into contracts, e.g. by clicking a mouse);
- a threat in the form of potential interference by third parties in submitting a declaration of will (after all, virtually all users of the network without exception are exposed to cyber attacks, viral infections, etc.);
- the participation of automated electronic systems on the market (these are computer systems used especially by entrepreneurs to enter into contracts on the Internet, which submit statements in an automated manner, without direct human participation);
- a lack of total and uninterrupted control over the declaration of will for technical reasons (every message sent via e-mail is automatically transformed into bit form and divided into several parts - usually files).

When I take the above considerations into account, I consider the distinction of electronic trade by creating a uniform definition to be useful - from social, economic and scientific points of view .

The Views of the Polish Doctrine

Generally speaking, the factor differentiating both types of trading, i.e. traditional and electronic ones, is the manner of submitting declarations of will and - as a result - the manner of conducting legal transactions. The logical approach is undoubtedly the focus on the concept of electronic legal transactions, including electronic contracts. This is also the case with J. Gołaczyński, W. Kilian, P. Podrecki, A. Stosio and W. Kocot, although it must be emphasized that the areas of their investigations are not identical.

The first of these authors formulates the following definition of electronic contracts: „an electronic contract is an agreement concluded by electronic means”.³³ This definition is correct, but unfortunately - from the point of view of the legislative policy and the practice of law, it is simply a truism of little use for legal transactions and the development of civil law. In a sense, J. Gołaczyński transfers the burden of limiting the area of law that interests us to the concept of electronic means. Specifying its content, he adds that it concerns a means of electronic communication at a distance, but at the same time it omits electronic information carriers. The rest of his argument, however, is - in my opinion - erroneous and inconsistent. The author notices the existence of electronic contracts concluded on-line and offline. The problem is that in the doctrine there are huge discrepancies in the understanding of contracts concluded and performed on-line and off-line. These English-language phrases are commonly misused, which leads to numerous misunderstandings with these concepts. By submitting statements of intent on-line, Gołaczyński means a situation when both contractors simultaneously participate in sending these statements over the ICT network. In turn, with regard to concluding an off-line electronic agreement, he understands this to be the exchange of IT media with a saved text file that contains the statements of the will of the parties. I would like to point out that at an earlier stage of his deliberations, Gołaczyński identified the means of electronic telecommunications as an element of an electronic agreement that distinguishes it from traditional ones, but at the same time omitted electronic information carriers. These carriers cannot be treated as telecommunications devices in any way. Finally, Gołaczyński mentions agreements concluded using electronic data carriers despite the fact that by defining the concepts in question, the author explicitly omitted them. In addition, the distinction between ‚on-line contract’ and ‚off-line contract’ made by the author is incorrect. The scope of meaning of both these concepts, is well known in the doctrine. An on-line electronic contract is understood as an agreement concluded via electronic means of communication, regardless of whether the parties participated in concluding the contract simultaneously or not. A contract concluded on-line is contrasted with an off-line agreement understood as an agreement where parties agree to communicate using electronic means of communication, but not directly, which means

³³ *Prawo umów elektronicznych*, ed. J. Gołaczyński, Wrocław 2006, p. 16.

that the sender is not sure whether the recipient actually received the sent data immediately after they entered the network. The confusion of these two divisions is in itself a serious mistake. The far-reaching consequence of this error is the author's ambiguous attitude towards contracts concluded by electronic means of communication without the simultaneous participation of the parties to the contract. Finally, it should be noted that concluding contracts through the exchange of electronic data carriers is currently very limited in practice. When contractors are directly indicated, it is preferable to exchange traditional statements of will, in writing, for example to improve communication and to avoid difficulties with evidence. Both the Polish and the German doctrines emphasize that there are still problems with this - despite the introduction of the principle of non-discrimination of contracts concluded by way of electronic exchange of information, expressed in Art. 9 of the e-Commerce Directive. In connection with the exchange of statements at a distance, it will be rational to send declarations of will via electronic means of communication. They are faster and do not require additional financial costs. In the further part of his work, Gołaczyński concludes that „it seems that to assess whether the contract is of an electronic nature, the manner of its implementation is also important”.³⁴ According to J. Gołaczyński, this criterion should be applied as an alternative, when the basic criterion fails, i.e. the traditional way of concluding the contract. In his opinion, in a situation where the conclusion of a contract takes place in the traditional way, but its implementation is in electronic form (dematerialized), then we are also dealing with an electronic contract. First of all, when concluding contracts, the traditional method does not have any aspects that support the application of the provisions on electronic trading. The form of the benefit should not have a decisive impact on what legal provisions to apply or what interpretation to make. It is only a derivative of the contract the nature of which is at the center of civil law interests. Recognition of such agreements as electronic in my opinion would be an inappropriate, groundless and even senseless and harmful solution. In these matters, Janowski also takes issue with Gołaczyński. Janowski sees the possibility of favoring a contract concluded in a traditional way, when the electronic method of its execution is the only one possible. However, he himself does not express his approval of such a view.³⁵

In turn, W. Kilian refers to the scope of the semantic concept of electronic contracts as „agreements between natural or legal persons communicating with each other by technical means (through digital communication networks) in order to conduct transactions involving intangible assets (so-called on-line execution or direct trade electronic) or creating an electronic basis for the release of tangible goods (so-called off-line or indirect

³⁴ Ibidem, p. 16.

³⁵ J. Janowski, *Kontrakty elektroniczne w obrocie prawnym*, Warszawa 2008, p. 57.

e-commerce)".³⁶ Its definition clearly differs from the one discussed above. I would like to draw attention to the particular element introduced by this author. In my opinion, it is unnecessary, because it has no impact on the merits of the definition, but only unnecessarily extends it, and what is worse - it is incorrectly formulated. It lacks a mention of organizational units without legal personality, to which the law grants the ability to perform legal acts. They are also called defective legal entities, quasi-legal persons or statutory persons. I consider the term „legal entities” to be more accurate, if it is useful in formulating definitions of electronic contracts. Instead of using the phrase „means of electronic communication at a distance”, the author talks about „technical means” and „digital communication networks”. They are undoubtedly synonyms.

Meanwhile, P. Podrecki refers only to the Internet in his arguments. According to this author, contracts concluded on the Internet are „all legal relationships, the essential element of which is the use of web pages as a means of communicating and submitting declarations of will to conclude an agreement”.³⁷ Note the syntax of this sentence, because this may raise some substantive doubts. The author in the same uses the concept of „all legal relations” and „contract”. The second of these terms is contained in the first, and at the same time they both refer to the meanings used in the middle of the definition of target factors, which causes a glaring lack of precision. I argue that P. Podrecki used the wording „in order to conclude the contract” completely unnecessarily. However, the extension of the subject scope of the definition to legal relations not included in the contracts should be assessed positively. This is because although in most contexts our considerations are related to contracts, the inclusion of unilateral actions in the scope of the electronic marketing law cannot be ruled out, because in certain factual states it is justified - both legally, substantively and logically. The law should take into account the possibility of such situations and, of course, be prepared for them. I approve the inclusion of a general clause called „an essential element” in the definition. In practice, there are such factual states, when the parties, seeking to conclude a single legal action, use both traditional forms of communication and means of electronic communication. As a result, agreements of a hybrid nature are created. Bearing in mind the above observation, I think that the definition of electronic legal transactions should contain the clause „essential element”. It would grant discretion to the judiciary, with the simultaneous subsumption of the facts. As I mentioned above, P. Podrecki chose the definition of electronic legal trading as the starting point for his deliberations. They start with the definition of the concept of „turnover”. In his opinion, this means: „exchange, circulation, transfer, transfer, transfer or transfer between various entities, parties, participants or contractors. The subject of trading are real entities (things), legal states, and so-called

36 W. Kilian, *Umowy elektroniczne*, in: *Prawne i ekonomiczne aspekty komunikacji elektronicznej*, ed. J. Gołaczyński, Warszawa 2003, p. 221.

37 P. Podrecki, *Pravo Internetu*, Warszawa 2004, p. 40.

information goods (digital products).” It is worth paying attention to the distinction of a new category of goods, namely digital (digital) products. In a subsequent part of the book the author uses mainly the noun „exchange” in order to shorten the definitions being constructed. This noun, however it is understood on the basis of the general Polish language or the Polish legal language, defines the action performed with the participation of at least two parties. P. Podrecki does not state directly how he understands this noun. Against this background, the question arises of whether the participation of both parties is necessary for completing a given transaction.

When analyzing J. Janowski’s views on this subject, I think that he also includes unilateral actions by his participants. When writing about the exchange in circulation, J. Janowski means not only individual interactions, but the entirety of relations taking place in it - between all the participants. Such a conclusion stems from a systematic analysis of his theses. J. Janowski distinguishes between definitions of the terms „legal transactions in the electronic environment” and „electronic legal transactions”. The definitions given here focus on different aspects of e-commerce. He understands the first term as a real exchange (e.g. economic - as a shift in property values) and a formal one (e.g. process - as a circulation of documents), which creates legal effects in the form of creating, changing or terminating an electronic legal relationship, i.e. a legal relationship with an electronic element.³⁸ The actual exchange refers to real and virtual entities, whereas formal exchange refers to the change in the legal status of these entities or subjective rights constituting an independent subject of the obligation. Thus, the above definition does not include actual exchange, non-formal legal effects. For obvious reasons, such an exchange remains outside of the area of civil law interest, which rightly found reflection in the definition. I consider it unnecessary to enumerate the possible legal consequences of contractual activities, because they are so widely known that they are indeed obvious. In addition, they are identical in traditional and electronic circulation, which eliminates the need to mention them in the definition of electronic trading. The definiens regarding the computerization of the legal relationship is described in more detail in the second definition, which is why I am going to analyze it while discussing it. Electronic legal transactions are legal exchanges and electronic communications as the entirety of legal and official transactions made in electronic form, i.e. with the use of electronic communication means and electronic data carriers. In this definition, Janowski clearly suggests that he also includes official activities (and, of course, public law). It should be added that legal acts are a logically and semantically broader concept than official activities. The set of official activities is included in the set of legal acts. Janowski, wishing to point out that he also qualifies official/public-law activities as electronic legal transactions, should distinguish private-law activities (or at least civil-law transactions) from them. An ex-

38 J. Janowski, *op. cit.*, p. 43.

tremely useful element of the definition is the clear distinction between the electronic form and means of electronic communication and electronic information carriers which are its subgroups. Taking as a differentiating element the recipient's electronic message, we can distinguish between real electronic transmission³⁹ and digital electronic transmission.⁴⁰ Under the first of these terms should be understood the direct handing over of the information carrier to the addressee of the statement written on it, or transferring such media to the addressee via the messenger. Meanwhile, d.e.t. is a message which was delivered to the addressee through the means of electronic communication. The distinction and consolidation of such a division in the doctrine has practical justification. During the analysis of facts that may potentially exist as part of electronic trading, I came to the conclusion that one should consider the possibility of regulating legal provisions as either separate for real and digital transmission, or aggregate, i.e. all legal transactions in electronic form. For example, a matter relating only to the actual transmission is the moment of submitting the *inter absentes* statement. The following question should be asked: which provision is appropriate for determining the moment of submission of a declaration of intent in electronic form by real transmission - Art. 61 § 1 of the Civil Code or Art. 61 § 2 of the Civil Code? And how should the correct formula be interpreted? If we choose the formula of Art. 61 § 1 of the Civil Code, we would have to ignore some of the instructions to read the addressee's wording. The moment of reaching a declaration of will in a traditional written form to the addressee is - incidentally - identifiable when it is immediately available for its content to be read. From now on, reading the content of the declaration of will depends only on the will of the addressee. Analyzing the moment of coming to a declaration of will in electronic form using the real message in relation to Art. 61 § 1 of the Polish Civil Code, a new factor should be taken into account. In practice, we are unable to determine if we have created such circumstances in which the addressee may become familiar with the content of the statement, as a result of which we cannot determine the moment of its submission. Familiarization with the declaration of intent in electronic form, recorded on an IT medium, depends not only on the internal will of the addressee, but also on external factors - namely whether they have the right hardware and software at any given time (or not at all). Of course, it is - respectively - electronic tools and software to decode signals, bit strings and data into a form that is perceived by the human senses. In the face of external factors that determine the recipient's readiness to make a declaration of will, the need to change the method of determining the moment of submission of a declaration of intent recorded on the electronic information medium should be considered. The provision of Art. 61 § 2 of the CC in a literal and explicit way it refers to declarations of will in electronic form, transmitted digitally, via electronic means of communication. This provision was

39 Called later: r.e.t.

40 Called later: d.e.t.

included in the CC by the Act of 14th February, 2003,⁴¹ as part of the Polish legislative offensive concerning the regulation of electronic issues. J. Gołaczyński writes incorrectly on this matter.⁴² Namely, he believes that Art. 61 § 2 of the CC includes the use of declarations of will transmitted by means of electronic information carriers. Such a thesis does not really solve the problems that arise. The content of this provision cannot be applied to r.e.t. Here I refrain from deciding which recipe to use, because it is not for the purpose of this work. The point is to demonstrate the legitimacy of consolidating the division of activities concluded in electronic form, using IT media (r.e.t.) or using electronic means of communication (d.e.t.).

Finally, we need to consider A. Stosio's reflections which focus strictly on the Internet itself. They state that „the conclusion of a contract via the Internet consists in exchanging relevant declarations of will by the parties to the agreement with this medium”.⁴³ It is not difficult to see that the area of issues addressed here concerns only the Internet, which makes it narrower than most other learned lawyers dealing with these issues. In fact, electronic legal transactions consist mainly of contracts concluded using this medium, but they are not the only ones that are classified under this category.

The last author whose views I am going to analyze in this subsection is W. Kocot., He points out that the concept of e-commerce usually means the sales, distribution, advertising and promotion of products via ICT networks, including primarily via the Internet. The scholar added that such understanding is commonplace. It can be logically concluded that he is aware of the existence of different views on the essence and nature of e-commerce. In practice and in the doctrine the notions of electronic trade, e-commerce and English-language e-commerce and e-business are understood synonymously. The creation of the last of these (e-business) is attributed to the IBM marketing department. The prevailing opinion is that it primarily refers to the business model, so you should avoid using it to define electronic trading in legal hearings. The definition of e-commerce itself is based on two pillars. The first of these includes activities that make up the very concept of trade. The second is the use of a tele-informatic network as a means of communication as an element constituting the electronic nature of trading. By definition, the author only mentions products. Trade, not only electronic, is understood as other activities, for example the provision of services. And even more - in direct electronic commerce, a special validity is given to a license agreement not mentioned by W. Kocot. Contracts concluded with suppliers of software products (software) are almost always contracts of this type. An exemplary antivirus program manufacturer concludes a license agreement with its clients. Cell phone contracts should also be mentioned, as their complex nature may cause consternation. The creation of such contracts

41 Dz. U. no. 49, item 408.

42 J. Gołaczyński, op. cit., p. 22.

43 A. Stosio, *Umowy zawierane przez Internet*, Warszawa 2002, p. 132.

has been forced by the marketing of computer software. Although an in-depth analysis of cell phone contracts is not within the scope of this paper, the multitude of contracts of this type justifies its mentioning. The complex nature of these agreements consists in the fact that during one consensual activity, two contracts are concluded with two different legal entities. The sales contract is concluded with the entity from which we purchase the software. In turn, the license agreement is concluded with the entity owning copyrights to the acquired software, provided that at the latest at the time of purchase we had the opportunity to familiarize ourselves with the terms of the license. As the practice shows, the scope of e-commerce is much broader and much more diverse.

Electronic commerce is still a relatively young, and thus only emerging, field of legal and economic marketing. Nevertheless, it exerts a serious and enormous influence on the entirety of social, economic and legal relations on a global scale. Therefore, lawyers of all professions and specialties - in particular civil lawyers, criminal lawyers and specialists in commercial law - should pay close attention to the sphere of legal and economic life discussed here. My diagnosis is only a certain reflection and a subtle suggestion on what aspects of the issues we are interested in should be focused on today. Another conclusion from my arguments is the otherwise optimistic statement that the existing legal and jurisprudential traditions are able to adapt to new, specific challenges posed by the development of technological civilization. Hence the validity of the conservative concept of the internet regulation presented in this paper, which suggests relying on the traditional legal and jurisprudential *acquis* - with the law of electronic trading as merely an overhead in relation to the existing legislative and doctrinal solutions.

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SUMMARY

The Legal Concepts of Online Commerce

The aim of the study is to present the selected legal concepts of online commerce. Electronic commerce is still a relatively young, and thus only emerging, field of legal and economic marketing. Nevertheless, it exerts a serious and enormous influence on the entirety of social, economic and legal relations on a global scale. Bearing in mind this assumption the author pays attention to the selected topics of online commerce that leads to a conclusion that the existing legal and jurisprudential traditions are able to adapt to new, specific challenges posed by the development of technological civilization.

Keywords: Online Commerce, Civil law, High Tech Law

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