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**Certain challenges and answers of the regulatory framework of the European Union  
affecting electronic commerce**

Summary of the theses

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## **I. Description of the research topic and research method**

Francis Fukuyama in his book published in 1997<sup>1</sup> examined the relationship between the development of the economy of the certain country and the level of trust among the members of the given society. The message of his work is that the level of trust among the members of a certain nation has a main impact on the economy of their country. The level of trust affects not only the structure of the economy but also the transactional costs. In societies where the level of trust is low, the transactional costs increase. Transactional costs have implications in the legal area as well, both in turns of law making and the application of the law. This is because as the number and volume of regulatory measures increase there will be an emerging need for people and institutions that will be able to apply these laws. The differences between the levels of trust of nations have an impact on cross-border trade as well; therefore it is interesting to examine this question in the context of the European Union, more particularly with regard to the internal market.

Information and access to information not only play essential roles in the economy but also can determine the level of trust among the members of the society. Therefore these issues cannot be separated from each other. The higher the level of trust among the members of the society the more information they will – even voluntary – disclose to each other. This rule applies in economic transactions as well. For example, in the field of consumer transactions it means that if the consumer can trust the trader and the consumer is offered a number of payment options including bank transfer and paying with credit cards, the consumer will not be reluctant to send his credit card data to the trader. On the contrary, if the consumer purchases something over the internet form a trader with whom he has no previous experience, a reasonable consumer would probably like to acquire as much information as possible and reasonable about the trader and the product. However, in many cases the traders might be reluctant to disclose the information that the consumer might desire to know unless the law requires them to do so.

Therefore, in many cases in order to enhance the level of trust, the law will intrude into the interrelated system of information and trust. Regulatory intrusion in relationships that are supposed to be based on mutual trust is always risky. It can either enhance or weaken the

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<sup>1</sup> Francis Fukuyama: Bizalom, Európa Kiadó, Budapest, 2007.

level of trust. In societies, where the level of trust among the members of the society is traditionally low, the legal regulation of trust-based transactions can for a certain period of time at the superficial level enhance the level of trust, however, in those cases the trust will not be based on the personal experiences of the members of the society, but on the law and the enforcement of the law. Therefore, in a larger context, it can even weaken the level of inherent trust among the members of the society. This is because the more detailed the law is, the more problems and questions it can create when it is adopted and applied. During the law making process the fight between the different interest groups can lower the level of trust in the society at large. The application of very detailed and extensive laws can also decrease the level of trust as the parties and courts might interpret the rules contrariwise. Of course, one can say that these negative effects can be prevented by making proper or so to say perfect laws. However, making perfect laws is just something that is very hard to achieve. This is the case in the European Union as well, where the finally adopted laws in many cases reflect a certain compromise among the interest groups. The efficiency of the regulation can be enhanced if the regulation itself is based on the results of private law making initiatives or on the self-regulation efforts of the interested parties.

Based on these considerations two questions might arise: what is the good objective and what is the proper measure? Of course, the aim is not to answer these questions in generally, but in the context of my research topic. For more than a decade the European Union has been working on the development and fostering of the electronic commerce within the European Union. However, the real aim is not the development of electronic commerce, since it can only be a measure from the point of view of economic integration. From the point of view of the European economic integration, the real aim is to ensure the continuous growth and competitiveness of the European economy. Digital economy has an inevitable role in this regard. The question is therefore, that through what means can the development of electronic commerce be ensured within the internal market, more particularly, how the trust in electronic commerce transaction can be enhanced. In this context during the research I examined whether the current primary and secondary sources of European law can ensure and/or enhance the level of trust in these transactions.

The research was mainly based on the examination, interpretation and analysis of the different sources. The sources I used during the research include several types of legal sources and secondary sources: primary and secondary sources of European Union law, judgments of the

Court of Justice of the European Union, opinions of the advocate generals, national laws, judgments of national courts, preparatory documents, model laws, reports, scholarly writings, etc. It is important to emphasize that during the research I paid special attention to the opinions of the advocate generals. This is because in many cases the advocate general and the Court reached different conclusions showing that sometime it is just not possible to give definitive answers to the questions concerning the interpretation of certain pieces of European Union law adopted in this area. Regarding the analysis of the relevant secondary sources of European Union law, the research examined not only the final text of the respective source, but also the documents prepared during the law making process to investigate and illustrate the role of the different stakeholders and institutions in the final texts.

## **II. The structure of the thesis**

The dissertation examines that to what extent can the EU regulatory framework of electronic commerce transactions meet the needs of the market and contribute to its development. The development of electronic commerce essentially depends on the level of trust among the traders, between the consumers and traders, and also, between the traders and national laws and law enforcement authorities. The research examined the impact that the legal regulation can have on the level of trust.

Due to the nature of European Union law, both the primary and secondary sources of European Union law contain provisions effecting electronic commerce within the internal market. And of course, the Court of Justice of the European Union has an inevitable role in the interpretation of these sources that cannot be overlooked. Although the primary sources of European Union law do not specially deal with the issue of electronic commerce, the Treaty provisions on the internal market and some special policies are applicable in the context of electronic commerce as well. Similarly, the necessary legal grounds for the adoption of secondary sources in this field, and also, for the procedures of the Court of Justice of the European Union are in the Treaty as well. Beyond the Treaty provisions, certain provisions of the Charter of Fundamental Rights have also relevance when one would apply the different sources of European Union dealing directly or indirectly with issues of electronic commerce. The set of secondary sources of European Union law affecting electronic commerce is quite extensive, and comprises of sources that are designed especially for electronic commerce and

more general sources that among other issues are applicable in the context of electronic commerce as well.

The dissertation, with regard to the limitations concerning its length, is divided into four main parts.

In the first part I examine the internal market provisions of the Treaty with regard to their impact on electronic commerce. The fundamentals of the European economic cooperation are enshrined in the Treaty, therefore the different policy initiatives of the European Union and the secondary sources of European Union law can exist only based on the Treaty, and within the boundaries set by the Treaty. During the examination of the internal market provisions of the Treaty in the field of electronic commerce I investigated that how these provisions are applied in this area and that whether the Court of Justice of the European Union applies different tests when applying these provisions not in the traditional commercial transactions but in the context of electronic commerce.

The second part of the dissertation is devoted to the examination and analysis of the different EU policy initiatives and actions adopted in the area of information society. This part is an especially important part of the thesis, since it investigates how the European Union aimed to set the objectives over the time, and also, that what measures were proposed to achieve the desired results. The results in many cases were the different pieces of secondary sources. An interesting feature of the policy initiatives, plans and actions is the continuous search for the proper means to achieve the desired level of trust.

The third part provides an overview of the relevant secondary sources of European Union law, structured and grouped in an order to show their relevance from the point of view of building trust in the electronic commerce market.

The fourth part of the dissertation examines some of the secondary sources of European Union law. The main aim of this part is to illustrate that what kind of regulatory measures were adopted at European level to tackle some of the challenges posed by electronic commerce. Of course, I do not aim to examine all the relevant legal sources in this regard. The focus is on the two that might be the two fundamental ones from the point of view of building trust in the electronic commerce market: the first relates to the private international law aspects of the

enforcement of contractual rights, and the second aims to enhance the level of trust in the information society service providers. Certainly, in the pre-contractual phase the level of trust is impacted by the rules on advertising, commercial communication and commercial practices. However, I do not discuss these issues in the dissertation since in these aspects the general rules apply, and there are no special rules especially designed for electronic commerce in this area. Although there are special rules dealing with the problem of unsolicited commercial communications, however I do not examine this question in the dissertation for two reasons: first, a proper discussion of this topic would require a separate dissertation, and second, this issue does not have a direct relevance from the point of view of the realization of a transaction and performance of contractual obligation, therefore it is not closely related to the narrow subject matter of the research. Although the research covered but the dissertation does not discuss the rules dealing with issues of the performance of contracts, contractual rights and guarantees. The research covered the examination of these issues only because the fear of the traders' defective performance is one of the grounds why the consumers might have low confidence in electronic commerce. However, for these matters the general rules apply since there are no special rules designed for electronic commerce transaction in this area either.

The dissertation ends with the part on conclusions of the findings of the research.

### **III. Summary of the main conclusions**

Based on the findings of the research covered by the dissertation the following conclusions can be made:

1. The first EU attempts to regulate certain aspects of the internet and internet activities emerged almost at the same time as businesses in the European Union started to use the internet for commercial purposes. The European Union and more particularly the Commission acted on the belief that the legal regulation of certain aspects of electronic commerce would foster the development of electronic commerce. However, the concern that whether the early EU-wide regulation of electronic commerce in 2000 was too early can be a valid one. The early regulation of electronic commerce at EU level prevented the member states from the opportunity to invent and develop their own solutions in their national laws for the legal challenges posed by the development of electronic commerce. Therefore the national laws

could not have been tested as to their possible efficiency and adequacy either. On the other hand, the fact that since its adoption in 2000 the directive on electronic commerce has not been modified might show the satisfaction of the member states with both the directive and the fact that these issues are regulated at EU level.

2. Based on the examination and analysis of the relevant legal sources and case law, it seems that the Court of Justice of the European Union applies the same test for electronic commerce transactions and traditional transactions. However, the importance of the interpretation of EU law provided by the Court of Justice of the European Union is increasing regarding the application of the secondary sources of EU law. It is enough to think about the characterization of car rental services concluded online or the liability rules applicable to intermediary services providers providing search engine services.

3. Most of the secondary legal sources affecting electronic commerce are based on the principle of minimum harmonization leaving room for the member states to adopt rules in line with their respective national interests. Although in many cases there are no studies available showing that the rules in the national laws going beyond that of the directives based on minimum harmonization would have deterrent effects on cross-border electronic commerce, the differences among the harmonized national laws can increase the transactional costs for both the businesses and consumers.

4. Although it is not special only to the pieces of EU law affecting electronic commerce, it is important to note that the differences among the different language versions of the respective legal sources can increase the uncertainty concerning the application of these laws.

5. Although adopting binding laws can be a good option to regulate certain areas of business activities, in the area of electronic commerce self-regulation and codes of conduct should play an important role. The need for self-regulation and codes of conduct is also emphasized in the directive on electronic commerce itself.

6. The development of electronic commerce to a large extent depends on the availability of adequate dispute resolution mechanisms tailored especially to the needs of electronic commerce. Although the need for such dispute resolution mechanisms had been emphasized as policy objectives at the EU-level, up until December of 2011 no effective steps were taken.

7. Regarding the examination of the subject of the research the conclusion can be made that the current framework of the relevant legal sources of the European Union is not capable of ensuring the desired level of trust in the heterogeneous European cultural and legal sphere.

#### **IV. Future applicability of the research and the theses**

The dissertation and the results of the underlying research can be utilized not only by the legislators both at national and European level but also in legal education and practice.

Some parts of the research are already used as bases for the curriculum of some university courses, during which the students can learn not only the relevant sources of European Union law but also have the opportunity to see the practical problems arising out of such laws. Moreover, these courses through the examples of the laws adopted in the field of electronic commerce at the EU level provide an insight to the world of EU and regional lawmaking as well.

Furthermore, the dissertation can be a useful source for practicing lawyers and members of the business society as well, concerning both the application of the internal market provisions of the TFEU to electronic commerce transactions and the examined and analyzed secondary legal sources.

#### **V. Relevant publications**

- Erdős István: Elektronikus kereskedelem, elektronikus aláírás (Electronic Commerce, Electronic Signatures) in: NAPIJogasz (Hungarian Legal Review), 2001 December
- Erdős István: A digitális aláírás szabályozása Németországban (The regulation of digital signatures in Germany) in: NAPIJogasz, 2002 March
- Erdős István: Patent for Computer-Implemented Inventions: A “Friendly Fire” on the European Small Software Developers? Analysis on the patentability of computer-implemented inventions under the European Patent System in: Collection of Research Papers, WIPO, Genf, 2004
- Erdős István: A measure to protect computer-implemented inventions in Europe, The Journal of Information, Law and Technology (JILT), 2004 (3), The ICFAI Journal of Intellectual Property Rights, 2005 (4), in: Európai Jogi Tanulmányok, editor: Dr.

Király Miklós, ELTE ÁJK Department for Private International Law and European Economic Law, Jean Monnet Centre of Excellence, Budapest, 2006;

- Erdős István: National Report of Hungary, The New Services Directive of the European Union – Hopes and Expectations from the Angle of a (Future) Completion of the Internal Market, (co-author: Dr. Miklos Kiraly) FIDE 2008 Congress Publications, editors: Heribert Franz Koeck and Margit Maria Karollusinz, Facultas Universitatsverlag, Wien, 2008.
- Erdős István: A possible direction of consumer contract law in Europe, in: Central and Eastern European Countries after and before the accession. Vol. 1. Editors: Somssich Réka, Szabados Tamás, Budapest: ELTE, 2011. pp 215 – 245.

**Studies, papers already accepted and scheduled for publication:**

- Erdős István: The impact of European private international law on the national conflict of laws rules in Hungary, to be published in: ELTE ÁJK Annales, 2013.
- Erdős István: Az elektronikus kereskedelem hatása az Európai Unió fogyasztói szerződésekkel kapcsolatos egyes joghatósági szabályainak alakulására (The impact of electronic commerce on the development of the jurisdiction rules of the European Union in the area of consumer contracts) to be published in: PPKE, Iustum Aequum Salutare, 2014.
- Erdős István: Az Európai Unió Bíróságának joggyakorlata az EUMSZ belső piacról szóló rendelkezéseinek az elektronikus kereskedelem körében történő alkalmazásával kapcsolatban (The case law of the Court of Justice of the European Union on the application of the internal market provisions of the TFEU to electronic commerce transactions) to be published in: ELTE ÁJK, Kari Acta, 2013.