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ELECTRONIC PAYMENT

SUMMARY

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Nowadays, the accelerated technological development led to the generalization of payments by electronic means and to its accessibility of these for all types of users, the status quo of this economic phenomenon being hardly followed by the dully adjustment of legal norms in the domain. The premises of the present thesis are represented by the differences encountered in the doctrine regarding the legal issues in connection with electronic payments, the discrepancies with general regulations, the differences on the meaning of terms used in legal, technical and economical contexts, as well as the hesitation of legal professionals towards the acceptance of IT and new means of communications.

As a result of the present scientific research, from the point of view of the principle of technological neutrality, the author presents *lege ferenda* proposals on the current internal regulation of electronic payments.

First chapter is analyzing the informational society – the framework for the development of electronic commerce – electronic payment and the instruments for their realization.

The recent development of electronic payment made the use of IT in all areas of social life not an option, but a necessity. It has been half a century since electronically transmitted information is a major help for the business world, and presently, this word could not exist without the use of new technology. Regardless if we analyze business between professionals (business-to-business), between consumers (consumer-to-consumer) or between professionals and consumers (business-to-consumer), all these happen in an overwhelming proportion with the aid of modern communication, the increase in volume of these businesses being determined mostly by the transmissions of correct, complete and rapid information.

The technology of the 20th century meant a great step forward also for the automation of payment processing, which led to the increase of commercial operations that could be simultaneously processed. The advancement of the computing power of machines dedicated to payment processing and the possibility to replace paper archives with magnetic and electronic support determined the computerization of

banks in whole, communications between them being exclusively processed by electronic means.

As a result of the high security level of electronic communications, the informational society partially adopted public affair activities, starting with the payment of taxes to public acquisitions (business-to-government) and to the acceptance of electronic vote. Electronic administration or e-administration improves the internal operability of the public institution, the computerization of the relationship with citizens and companies, as well as the direct access of users to the electronic services of the public institution. On the one hand, this way, the public income is increased by the taxation of incomes from on-line commercial activities, also due to a better establishment of fiscal administration, and on the other hand, the costs of public administration functions are reduced by the dematerialization of administrative acts, by electronic archives, by the interconnection of date bases used by different institutions under the control of different ministries, and by local administration entities.

The 2005 – 2009 computerization strategy of the judicial system was its most extensive improvement, being a necessary step in order to bring the administration of justice more close to its declared goal of guaranteeing a transparent and upright judicial process. The lack of a systemized plan after 2009 and the delay in applying the Strategy for 2013 – 2017 led to discrepancies towards the European standards. A coherent legislation and the will of administrators of the judicial system are the sole ingredients necessary for drafting a modern system of justice.

One of the major negative effects of introducing computers in public administration is the centralization of administrative decisions. The free will of the public servant necessary in such situations is lacking, due to the regulations of public institutions or due to the refuse of the public servant based on the false argument of the impossibility to modify the software.

The transfer of a part of social activities from the physical life into the virtual one inevitably leads to the necessity of regulation on the transfer of information and goods by electronic means, with the declared purpose of contributing to the improvement of the standard of living for every individual, regarded as a member of the society, as an effect of economic growth and due to access to education, culture and civilization.

Considering that the national law is usually applied according to the principle of territoriality, while the electronic environment, commonly synonim with the term

„Internet", spreads beyond national borders, the necessity of specific regulations for the information society arose.

The main argument behind this statement is that, on the one hand, we need the stability of legal relationships imposed by national laws, aimed to secure the communications, including commercial ones launched in the electronic environment, while on the other hand, the complexity of the its operation structure exceeds the control possibilities of national authorities, both territorially and technically.

Changes in the Romanian law from the perspective of the information society meant adopting the Community acquis regulations related to electronic signature (eSignature Law nr.455/2001) and electronic commerce (eCommerce Law no. 365/2002). The New Civil Code in force since October 1st, 2011 established the electronic form as a modality of entering a contract along with the other traditional methods, also recognizing the importance of electronic documents as means of evidence.

We emphasize that Romanian law associates the notion of e-commerce with that of information society service. Romanian lawmaker's definition thereof, as defined by art. 1 section 1 of Law no. 365/2002 on electronic commerce transposing the European legislation in the national law, can be mistakenly understood in the sense that the service is performed "*by sending information at the individual request of the recipient*", being basically reduced to simply supplying information. Whereas, art. 1 par. 2 of Directive no. 98/34/EC, referred to by art. 2 lett. a of Directive no. 2000/31/EC, refers to services rendered "through data transmission", by individual request. This slight difference in tone is particularly important, given that the service is provided through data transmission, as established by Community rules, without representing solely electronically transmitted information, as Romanian legal wording might suggest.

Regarding the public component of the information society, one notices that Romanian legislation differentiates e-administration from e-government by establishing as essential the element of territoriality when it comes to the jurisdiction of public authorities. The definitions of both concepts stated in article 11 lett. a and b of Law no. 161/2003 are identical, except that the subject of e-government is the central public authority (i.e. the government), while in the case of e-government, the subject is the local public administration. Defining these concepts strictly on the grounds of public authority being central or local, is in our opinion, irrelevant in order to offer a proper definition of these two notions. *De lege ferenda*, we consider

necessary to redefine the term e-government in the Romanian law, in a manner consistent with its meaning in the national law of other advanced countries.

Electronic payment is listed as an essential element of the information society, being the regular method for the performance of specific obligations.

According to art. 1469 of the Civil Code, payment is defined as the remittance of a sum of money or, should it be the case, the performance of any other services that are the object of the obligation itself. If in a broader sense, the payment involves voluntary performance of any obligation, in a narrower sense, in common language, payment requires for a sum of money to be handled.

The definition of the new Civil Code is not essentially different from the previous meaning given by the doctrine, except for express reference to the payment as remittance of a sum of money, while other performances remain subsidiary. The importance given to payment by method of remittance of money is, in our opinion, quite remarkable, considering that such is established as default execution of payment. The other alternative payment methods are therefore given a secondary role, being in fact rarely encountered in practice.

We consider the payment to always be a legal act presupposing the will to pay, respectively, the will to receive the payment. This manifestation may be expressed through an act with legal significance, such as the remittance of a sum of money or through a document containing the payment order, for electronic payments. Payments are usually mediated by a sort of currency: fiat, scriptural or electronic. When a currency is officially recognized as method of payment in a given territory, the lawmakers may impose mandatory acceptance thereof as manner of performing all public and private obligations.

Issuance of fiat currency is performed under direct supervision of sovereign states through their central banks. An exception from this principle is found in the case of EURO, whose issuance is done under the control of the European Central Bank.

Electronic currency may be issued both by a bank, as well as a non-banking financial institution and even by a trader. When it comes to electronic currency, we refer to payment not only as the fulfillment of debtor's order to transfer the monies in creditor's account, but also registering dematerialized securities in the name of the creditor with the electronic registers and even the software provider sending electronic activation codes of previously purchased computer programs on users' emails.

From the scarcity of the provisions of Chapter III of Law no. 127/2011, one can distinguish the intention of the lawmaker to establish several principles applicable to the issuance of electronic currency, namely: value equivalence between electronic currency and the funds received in exchange, simultaneity of issuance of electronic currency and of the receipt of exchange funds and finally, the redemption of electronic currency should be possible at any time, at par value and free of charge, at the electronic money holder's request.

Electronic money is a multifunctional method of payment, mainly used on the Internet or through digital wallet. In Romanian law, Directive no. 2009/46/EC has been transposed by Law no. 127/2011, defining electronic currency as being "*monetary value representing a claim on the issuer which was issued on receipt of funds in order to be used for payments by accepting persons, other than the issuer*".

Unlike payments made from personal accounts, payments completed with electronic currency are anonymous, similar in effects with the fide currency. Electronic money issuer has the obligation to repurchase the e-currency at any time, free of change and at face value.

Electronic payments always involve payment by proxy. Hence, the unconditional payment order shall be in all cased received by a specialized institution, which shall draw the funds stated on the payment order from the issuer's account and shall transfer it to creditor's or his representative's account. Payment is made according to the parties' agreement. Absent such agreement, the imputation will be completed either by the debtor in strict compliance with the rules established pursuant to art. 1507 Civil Code, by the creditor, according to art. 1508 Civil Code, if the debtor has not expressed its intent, or eventually, pursuant to the rules of legal imputation set forth by art. 1509 Civil Code, should none of the parties make the imputation of payments.

Payment must be made at the time established by the parties. Payment date can be established at a calendar date or within a period calculated by reference to the date of conclusion of the convention.

For bank transfers, the date of payment will be considered the date when the funds subject to payment have reached creditor's account (art. 1497 Civil Code). Unless otherwise stated, all expenses related to payment are borne by the debtor (art. 1498 Civil Code), including all cases when such expenses are due to early payment (art.1496 par. (1).

Since 2003, electronic payments have become a reality on the non-bank market as well. Thus, pursuant to article 1 par. (3) of OUG no. 193/2002, acceptance of debit and credit cards as payment methods has become mandatory for companies engaged in retail and have an annual turnover of more than the equivalent in lei of EUR 100,000. The rules governing electronic payments in relationship with the three categories of users of electronic money contain specific provisions, especially regarding consumer protection, having direct impact upon the civil liability.

Article 63 of the Treaty on the Functioning of the European Union sets forth in par. (2), the principle of freedom of payments between Member States on one hand, and between Member States and third parties, on the other hand. However, the other basic principles of the European Union include certain limitations, such as the fact that payments, based on the free movement of capital, must respect the limits within one can make use of this freedom.

In order to complete electronic payments in EUR currency within a single, stable, integrated frame, Single Euro Payments Area has been created. Firstly, this area was intended to unify the existing national procedures related to credit transfer and direct debit in EUR within a single procedure, and secondly – it was aimed to simplify card payment, so that it can be used in the entire euro area; and last – due to the increasing use of electronic payment instruments, while reducing the costs.

Development and computerization of the banking system led to the transposition into cyberspace of payment instruments as well, mostly of bills of exchange, promissory notes, check and bank transfers.

Computerized bills have been used since the '70s in countries which possessed the technology required by automatic compensation and had market economy in which such bills had been normally used. French banking system uses a standardized printed form since 1974, form which is versatile in terms of its circulation as traditional or computerized bill. Currently, most electronic payment instruments are globally spread, being suited for computerization two types of bills: bills of exchange and promissory notes.

Nevertheless, we need to emphasize that electronic bills have not completely eliminated the circulation of paper drafts, firstly requiring a paper support and later, proof of payment, printed on paper. Economic efficiency precisely requires the elimination of paper and its replacement with computerized bills, aiming to establish bills of electronic commerce, situation which however is not supported by the existing

technical possibilities. It is highly likely that in the near future, after standardization and securing the electronic means of communication, computer bills may be used similarly to traditional ones, by having a single original document including all legal wording, writ which may be secured, protested and, eventually, be rendered enforceable.

On the other hand, the possibility of computerization of the check and of electronic check issuance, allows us to include the check in the category of payment instruments suitable for full use in the electronic environment.

Electronic card - as payment instrument, represented a real revolution in this field, its creation leading to a significant decrease of cash payments. Using cards as cashless payment instruments, basically involves the collaboration between the issuer, the user and the accepting third party. Being only a payment instrument, electronic card can only be issued as accessory, after the opening of an account by its future owner.

The electronic transfer is another method of payment allowing the circulation of electronic currency from one account to another. Efficiency and security enjoyed by transfer of electronic funds led to widespread use of this payment instrument on the interbank market.

Adapting electronic transfer to the needs of information society allowed the development of transactions via Internet. The specificity of electronic commerce via Internet is given by the fact that a significant part of the transactions implies that both sides of the transaction enter such through a computer, making the online payment, while the counter-performance is completed in the same way or traditional methods. Of course, electronic means of communication are designed to facilitate relationships between absent parties. The intermediation of technology may primarily lead to the uncertainty of commercial relationships, both regarding the identity of trading partners, as well as the trade secrets, and secondly, it may result in the futility of certain pre-contractual activities, precisely caused by the extremely high number of competitors using the same methods. From another perspective, entering an electronic contract between present parties would be seen as exception, because the conclusion of contracts *inter praesentes* is facilitated by the possibility of immediate use of paper. Consequently, the conclusion of contracts through a computer, with certain specificities described in the hereby thesis, falls into the category of contracts between absent parties, by correspondence.

In order for a proposal for concluding a contract electronically to be defined as a firm offer, two essential conditions established by the art. 2.1.2 of the UNIDROIT

Principles, namely to be clear enough and to indicate the intention of the offerer for such proposal be biding in case of acceptance, must be met. Extensive analysis of aspects related to electronic conclusion of contract revealed specific issues of information society. Such relate in particular to the volatility of information and to the risk associated with the uncertainty of business partners, with characteristics of the delivered goods or services rendered and, not least, the risks in connection with personal data and privacy protection.

The lack of electronic borders has created difficulties in determining the applicable law for certain transactions, as private international law provisions are not in all cases adapted to information society issues. Concerning the law applicable to the contract, the parties will have bound by the mandatory provisions of the place of conclusion of contract. Hence, an electronic contract that does not meet the safety requirements provided by Law no. 455/2001 on electronic signature, for electronic documents, to the maximum extent will be consider as partial written evidence, although the document may be considered valid according to the requirements of a foreign law.

Other payment instruments analyzed in this chapter are the bill for collection and letter of credit, whose computerization has led to the development of international freight traffic, due to increased speed and safety of payments via electronic channels.

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In the **second part** of the thesis, the author analyzed the electronic document and electronic signature, from the perspective of constituting evidence of electronic payment as legal operation. Legal proof of payment, in the real world, is made pursuant to art. 309 of Civil Procedure Code. Within the electronic environment, proof of payment can only be made through an electronic document, bearing an extended electronic signature.

As per Law no. 455/2001, which transposes Directive no. 1999/93/EC, the notion of *extended electronic signature* is defined as being the information exclusively controlled by the author and serving for his identification, represented in a conventional form suitable for the creating, processing, sending, receiving or storing such through electronic methods, attached to or logically combined with other information of the same type, so that any subsequent amendment to be such information can be easily identified.

Extended electronic signature is based on a qualified certificates issued by accredited providers of certification services. The most discussed aspect related to electronic signature is represented by the protection of personal data. Directive no. 95/46/EC establishes the general framework for the use of personal data with respect to the principle of their protection, provided that exceptions are too numerous, and their wording leaves room for arbitrary interpretation which may easily lead to abusive exercising of rights granted to operators and public authorities.

Considering the assimilation of electronic contracts to adhesion contracts, as far as general terms and disclaimer statement are concerned, given that the evidence of a legal operation does not necessarily imply its registration, *de lege ferenda* we recommend establishing actual proceedings aiming to privacy protection, in line with the recommendations of the Council of Europe and the European Union, also providing unequivocal opportunity to trade online without expressly revealing the identity of the parties.

Regarding the electronic document, such is defined pursuant to art. 4 par. 2 of Law no. 455/2001, as being "*a collection of data in electronic form, between which a logical and functional relationships exists and which renders letters, numbers or any other characters with intelligible meaning, destined to be read by a computer program or by any other similar device*" . The intention of Romanian lawmakers is to define the electronic document as electronic data that will be presented in the form of understandable and readable graphic signs, when read by a computer program.

Also, electronic documents to which an extended electronic signature has been attached are assimilated to private documents, without exceptions.

Among the documents that may be issued in electronic form, pursuant to art. 155 of the Tax Code and to Law no. 148/2012, the law includes invoices, bills and receipts, given that they meet the fiscal requirements.

For an electronic writ to be considered evidence according to civil law, similar to the traditional document, it is mandatory for it to provide the possibility of identifying its issuer and for the document security to be guaranteed, from the time of signature until the time it is used as evidence. Should the electronic document not bear an extended electronic signature, it may be used as partial written evidence, to be corroborated with other evidence.

Assimilation of electronic document to traditional writs, by the provisions of art. 5 of Law no. 455/2001, led to the decrease of the supremacy of traditional document

within the evidentiary assembly. The judge who will be shown two disputed documents on different supports, will need to establish their validity independently of each other.

For electronic documents, "*the original*" may be infinitely multiplied, all copies being considered originals, as long as copying means creating a new file whose data is faithful reproductions of the source document, using a program (software) run by a computer (hardware). Basically, the original and the copy may be distinguished only based on the creation date.

From the perspective of the concept of evidence, we consider that the electronic document cannot be considered *instrumentum*, as it represents solely the purpose-information, while in reality, the information is offered by a set of data contained in a file that can only be used through decoding by a specific computer program. Basically, *instrumentum* refers to vector of the document materialized in the few bits of data on optical or magnetic media.

Concerning the procedure of verification of records, where electronic documents are involved, art.8 par. (2), final thesis of Law no. 455/2001, sets forth the purpose of verification as *"to identify the author of the document, the signer or the certificate holder*". We believe that in this case, the lawmaker has been much closer to the classical model of the document, rather than to the electronic document. Considering the possibilities of writing electronic documents, in order to determine the authorship of a document, it would suffice to identify the electronic signature holder and its link to the document in discussion.

Electronic filing of an electronic document is governed by Law no. 135/2007. For a document to be filed, it must be accompanied by a valid extended electronic signature of its rightful holder.

The law distinguishes between the issuer of the document, its owner and the legal holder. As defined by art. 3 lett. h of the above-mentioned law, the lawmaker establishes that the legal holder of the document "*is the natural person or corporation who either owns or has issued the document, who has the right to establish and modify rules of access to the document, as required by law*". The value of original or copy of the electronic filed document is given by its holder and is established by attaching the electronic signature of the electronic archive manager (art. Article 8. (1) of Law no. 135/2007).

Access to the electronically archived document is granted based on the agreement between the holder of the document, which established the right of access, and the

electronic archive manager which guarantees the right of access to archived documents and the access conditions. This act needs to either be completed or transposed in electronic form and shall constitute an annex to the archived electronic document. Violation of access rules, of the security and integrity of the electronic documents will engage the civil, criminal or contravention liability, as appropriate.

The legal study of basic technical elements which render the existence of electronic payment possible, namely the electronic document and electronic signature, is followed by the analysis of payment systems as "transmission" infrastructure and of its operators – service providers in this field.

Payment systems have been created in order to improve the conditions of interbank payment settlement of various financial institutions. European legal framework in this matter is established by Directive no. 2007/64/EC, whose art. 4 par. 6 defines the payment system as a "*funds transfer system governed by common formal and standardized provisions and rules, destined for processing, clearing and/or settlement of transactions*." Romanian law also takes the European definition, as of art. 5, par. 29 of OUG No. 113/2009 on payment services.

Pursuant to art. 28 par. 1 of Directive no. 2007/64/EC, the principle of non-discrimination of payment services providers regarding the access to payment systems is established. Considering the European character of this regulation, it is implied that such requires for the parties involved in the payment process to be established in any of the European Union countries and to be authorized to carry out such services, under the rules applicable to the country of domicile.

Among payment systems, the most representative are FEDWIRE, ACH and CHIPS in the United States, TARGET 2 in Europe and TRANSFOND in Romania.

Payment services providers are the main actors of the payment systems, acting as intermediaries between the final beneficiaries of electronic transactions, regardless of their quality of professionals, public authorities or ordinary individuals.

The **third part** of the thesis, outlining the legal liability in the matter of electronic funds transfers, aims to analyze the specific grounds of civil and criminal liability. Transactions involving electronic transfers of funds are subject to specific risks whose materialization may cause significant damage to both payment systems beneficiaries and the operators. Identifying the risks leads to secured protection of transfers, both technically and through economic and legal regulations.

Considering these aspects, civil liability for electronic fund transfers primarily originates in the common law rules of contractual liability, as well as liability in tort. Specific rules of liability in this matter have been established by the regulations of the National Bank of Romania, developed in accordance with the European guiding legislation. Thus, as we have pointed out several times during our scientific pursuit, many of the rules established by Romanian law have similar correspondent in the law of other European countries, as a consequence of the gradual unification of European law.

On the question of aggregation of contractual and tort liability, we believe that the two forms of liability cannot be cumulative, even when intentional breach of contract occurs. The effects of contractual liability in case of *culpa lata* in this case are similar to those of liability in tort, according to art. 1257 of the Civil Code, which gives the executing party the right to claim damages when seeking annulment of the contract or the reduction of the performance with the value of damages if the party seeks to keep the contract in effect. The right to seek the annulment of illegal or of clause potestative in court cannot be equated with the right to elude the rules of contractual liability. Only the judge can rule upon their nullity and only if he finds them to be in violation of some of the essential conditions for the validity of the contract, in such cases applying the common rules for liability. Consequently, the damaged party cannot choose between contractual and tort liability, when the damage has been caused by unintentional breach of a valid contract.

In contractual liability matters, debtor's fault is presumed when engaging his liability for the breach of his obligation to perform the contract, as reflected by art. 1548 of the Civil Code. However, the debtor may overturn this presumption, showing that the breach is not caused by his non-performance, resulting in him being relieved of damages, consistent with the interpretation of art. 1547 Civil Code. In the matter of liability in tort, the existence of the fourth essential condition, the fault, needs to be always proven in order to engage liability.

An important place in the economy of the thesis is occupied by the analysis of the elements of civil liability, this being an approach where we considered the special circumstances of operators of electronic funds transfer systems causing damages to third parties and to the National Bank of Romania, as an independent public authority responsible with the organization and supervision of payment system services.

A detailed research upon the electronic funds transfer systems operators' liability has been necessary due to the different grounds on which the liability is based. Hence,

for damages caused to the clients - users of these systems, as well as for damages caused to third parties, the operators will be liable pursuant to specific rules defined in the regulations of the National Bank of Romania and only as subsidiary, common law liability. This is the reason why in some fields, such as payments through electronic payment instruments, liability is limited under certain conditions, because, should the liability be based on common-law rules, the damages could not be capped, the criteria of full coverage of damages prevailing.

An issue that has raised numerous questions is related to the liability of operators of electronic funds transfer systems when damages are caused to third parties. We consider that in this case, the operator's liability is that of a legal person, if the loss was caused to the defective organization of the system, and not due to the operator's agents' fault. On the other hand, technical malfunctions that may occur during the process of transfer of the funds may cause damages to third parties. Such malfunction often involves a software error - software programs without which the electronic funds transfers would be impossible.

The electronic funds transfer is indeed a complex operation that involves a human and a technical component. Given the complexity of information systems and the impossibility of distinguishing the causes which led to damages to third parties, we considered that in such cases the civil liability of system operator electronic funds transfers, based on the idea of warranty, would be engaged.

National Bank of Romania is an independent public authority managing, among others, electronic funds transfer systems. Compared to its nature of administrative authority, the nature of the liability of the National Bank is undoubtedly patrimonial liability of an administrative body, when it concerns its acts of regulation and supervision of payment systems. In these circumstances, the National Bank of Romania is required to regulate and supervise the operation of electronic funds transfer systems and any breach of this complex obligation engages liability thereof. Given that neither banking law, nor the National Bank statutory law do not contain any provisions related to the liability of the institution upon the proper functioning of the payment system, the applicable rules will be those of the administrative liability, as established by Law no. 554/2004. We consider that proving the damage has been caused due observance of the document issued by the National Bank of Romania is sufficient for engaging its liability under art. 1 of Law no. 554/2004. Existence or absence of the fault element is irrelevant in this matter .

From another perspective of the specificity of liability in the matter of electronic payments, a thorough research of the elements of liability for electronic transfers, including the particular case of credit card payments is particularly relevant.

In the field of electronic transfers, the civil liability of the operator authorizing the payment is engaged should a breach of the contractual provisions on the transfer of funds occur. The clauses related to the transfers of funds are usually contained in banking contracts, credit agreements or other contracts for specific payment instruments: e-banking agreements, mobile banking and bank card contracts.

Personal liability of users of electronic funds transfer systems, with very few exceptions found in the regulations on electronic payment instruments, does not benefit from special derogatory rules regarding its essential condition conditions, hence the common law is usually applicable. However, we emphasized that a translation towards the objectification of legal liability of the providers of services in the field of electronic payments is to be observed, as the risks are often caused by technical issues, and not due to human fault.

The receiving bank has the obligation to verify certain aspects in order to certify the authenticity of the transaction, such as the proxy signature, the stamp of the person authorizing the payment, if applicable, etc. Should the execution of the transfer be impossible or involves excessive delays or costs in order to complete such, the bank is required to inform the client issuing the payment order before the end of the period of execution and to request further instructions.

In what regards liability for damages caused by falsification or alteration of information that allows payments, we can state that that this liability can be included in the category of objective liability for risks of activity, and as it was underlined earlier, concerning the limitation of the effects caused by losing, theft or destruction of the payment instrument, having in view the due diligence character of the legal obligation, the liability will be engaged only in the case when the issuers' fault is proved.

The liability of the holder of the payment instruments user is engaged when the user is in breach of the obligations established by art. 24 of N.B. R. Regulation no. 6/2006. Thus, the user has the obligation to use the payment instrument in accordance with the contractual provisions and, obviously, in accordance with law.

The user has the obligation to take reasonable protection measures against theft, losing or damage and to immediately announce the issuer in case of theft,

damage or lose or in the case of suspicions regarding copy or in the case when third parties gain access to the password or in the case of malfunctions of the payment instrument and in any case of irregularities on the registration of transaction on the account.

The merchant's liability is contractual in nature, towards the acceptant institution/issuer, and also towards the user of the payment instrument. Thus, its relation with the issuer is contractual on the basis of the convention on the acceptance of the payment instrument. On the other side, between the merchant and the user, the legal relation is based on a commercial contract, and the price is paid using an electronic payment instrument, hence any obligation regarding the payment can be included in that contract. Only in the case when the commercial operation is declared null and void or if the merchant used the card to commit a fraud, his liability is based on tort.

At the end of the last part of our study, we briefly analyzed the most important aspects of criminal liability that can intervene in the use of electronic payment instruments and in the use of the electronic fund transfer systems. The criminal sanctioning of certain acts appeared in our legislation only in 2002, once Law no. 365/2002 on electronic commerce has been adopted, law that represents the transposition of Directive no 2000/31/EC.

The second Romanian legal act that is important in the criminal protection of electronic funds transfer is Law no. 161/2003, specifically Title III "*Prevention and fight against virtual criminality*", that provides necessary definition for terms such as informational system, internet service provider and incriminates wrongful acts committed in the virtual space. It has to be mentioned that, from the law's title one cannot deduct that it regards the fight against informational criminality, but we can only ascertain with resignation the Romanian lawmaker's incapability to apply the legal technique rules clearly stated by art. 41 para. (1) of Law no. 24/2000.

Among the incriminated acts from the domain of electronic funds transfer we analyzed the three most frequent ones: informational fraud, the perpetration of fraudulent financial operations and acceptance of fraudulent financial operations.

In **conclusion**, without any doubt, electronic payment will represent in the future, the generalized payment method. The continuous evolution of IT will bring new challenges for legal practitioners used with clear and stable legal norms, situation that is not characteristic for the present domain. On one hand we embraced the theory

on the necessity of a minimal regulation due to the need for the free development of IT, and in order to avoid the creation of legal norms that will soon became out-of-date, and on the other hand in order to avoid providing for professionals of law useless instruments, due to the existence of extremely specific legal regulations.