

THE LEGAL CONTENT OF E-COMMERCE IN THE LIGHT
OF POLISH AND EU CIVIL AND TAX LAW

E. Juchniewicz

Gdansk University (Poland)

M. Stwol

Gdynie Maritime University (Poland)

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Abstract: *in law and literature, there is a large variety of descriptions of e-commerce content and completely different concepts of treatment of electronic products. Mostly the beginning of studies on e-commerce content is based on comparing it with the real world products, in particular with the goods and services in terms of the classical (real) sense. This paper is an academic attempt to outline the problems of the lack of appropriate e-commerce definition in civil and tax law.*

Key words: *E-commerce taxation, electronic trade, electronic business.*

Аннотация: *в научной литературе существует большое разнообразие взглядов на проблему электронной коммерции и совершенно различные концепции отношения к электронному продукту. Главным образом первоначальное изучение электронной коммерции базируется на его сравнении с реальными продуктами, в частности с товарами и услугами в терминах классического смысла. Эта статья является научной попыткой обрисовать проблемы недостатка соответствующей дефиниции электронной коммерции в гражданском и налоговом праве.*

Ключевые слова: *налогообложение электронной коммерции, электронная торговля, электронный бизнес.*

Introduction

The subject of e-commerce is an unclear term, which already got many definitions in legal regulations, literature and court decisions. They all view the subject as products that exist without any material form (e.g. bought online and sent to your computer in electronic form). It should also be mentioned that various definitions of e-commerce are presented in the economic literature, where we can see very different opinions on the same problems.

An introductory example for this paper can be the discussion in the WTO related to the problem – whether products which lack physical «embodiment» and can be transferred from one computer to another, should be treated as a commodity, or a file transfer should be treated as a supply of services?¹ It is worth recalling that the European Union regulations and policies also use a broad term for e-commerce and its content – the term «information society

¹ See more Kowalik-Bańczyk, *Sposoby regulacji handlu elektronicznego w prawie wspólnotowym i międzynarodowym*, Zakamycze 2006, s. 46.

services»². However, the nature of EU legal regulation and its scope does not solve the problem of the distinctions between goods and services.

The problem of distinction between goods and services concerns the broad meaning of electronic property, which in turn creates many legal conflicts due to the lack of regulations or lack of precise definitions. Goods and services are quite different institutions in tax law, which generally means the use of different rules for tax purposes. A feature of electronic commerce commonly accepted by academic society is its international character (global, without geographical borders). Hence, the source of effective regulation should be the uniform definition of e-commerce and the various components of its legal structure that will be accepted by all countries. There could be some model definition of e-commerce that will be used by various legislators. The dispute about goods and services in the content of electronic commerce shows us the essence and legal nature of new technologies. Certainly it can be said that in the virtual environment borders between goods and services, which were protected for centuries, are disappearing. Right now, we are trying to get the answer to the question whether regulations applicable to the legal relations between goods and services in the «classical» form are or will be sufficient for modern and future e-commerce content. It is noteworthy that the doubts in the law of the boundaries between goods and services also apply to «classical» – non e-commerce products and services. In turn, the specific characteristics of electronic products make these issues more complicated, with more questions than answers.

[Good (commodity)³ – articles of commerce⁴; product intended for sale; occurs in commodity – money economy and has some value – in the ability to meet the needs of somebody, and removable – expressed in the price⁵;

Services – it is an economic activity provided by natural and legal persons to other persons not involving the production of material goods; services in-

² For example – Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations – art. 1 – «service», any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services; see also Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market («Directive on electronic commerce»); see also as an example – Convention on Information and Legal Co-operation concerning «Information Society Services» CETS No.: 180 source: <http://conventions.coe.int/treaty/en/Treaties/Html/180.htm> [last visited: 10.10.2015], see art. 2 definitions – «Information Society Services» means any service, normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

³ In this paper the terms «good» and «commodity» will be used interchangeably – with the same meaning.

⁴ See the definition of good at The Free Dictionary by Farlex, source: <http://www.thefreedictionary.com>;

⁵ See more at Encyklopedia PWN, źródło: <http://encyklopedia.pwn.pl/haslo/3988357/towar.html> [ostatnia wizyta: 26.10.2015].

clude: transport, communications, trade, public utilities, health, education, administration, justice, financial institutions, insurance and others.^{6]}

The meaning of electronic commerce in the light of civil law

The problem of distinguishing goods and services in e-commerce refers to various branches of law. Different legal consequences in the context of different treatment of the subject of electronic commerce may occur in particular in civil, tax and private international law. The Polish state legislator does not generally use the terms «goods» and «services» in civil law, in particular directly in regulations, to mean a subject of sale. These terms are used in the Polish Civil Code⁷ many times, generally in a narrow sense, in connection with certain legal conditions⁸. In legal language, the term commodity is used to determine the same items as a subject of sale. We can also find the same meaning in economics. In the light of civil law it is more reasonable to compare or present the term «commodity» in the context of such well-known institutions as a thing (property) as the main element of property law. In turn, it is worth noting, that in Polish legal language the term «thing» is used for material objects. The Civil Code does not make the classification of types of things. This is done in legal doctrine and case law by the statement of the rules governing the legal position or trade of different things⁹.

The provisions of civil code concerning things (property) do not apply to non-material things (property)¹⁰, including electronic products. Intangible assets, by their legal nature cannot be things, but exist along or next to thing (property), and even instead of things (property) as new specific objects, goods etc. Things (property) can be used for intangible assets as a substrate (or material medium) that allow customers, for example, to use the above-mentioned intangible assets. We buy a painting because of its artistic ex-

⁶ Encyklopedia PWN, źródło: <http://encyklopedia.pwn.pl/haslo/3991813/uslugi.html> [ostatnia wizyta: 26.10.2015].

⁷ The main source of civil law is the Act of 23 April 1964 Civil Code, which contains general principles of civil law and regulates subjects of civil law, proxies, property, legal actions, declarations of will, deadlines, statute of limitations and etc. Dz.U. 1964 nr 16 poz. 93. with later amendments.

⁸ As an exception should be treated the use of term «commodity» in the Act of 12 June 2003 on payment periods (deadlines) in commercial transactions Dz.U.2003.139.1323; Art. 2 of mentioned in this footnote of the Act – Commercial transaction within the meaning of the Act is an agreement whose object is the supply of goods or supply of services if the parties enter into an agreement in the context of their business or professional activity. The Act does not contain any definition of goods (commodities) or services; see also L. Ogiegło, *Usługi jako przedmiot stosunków obligacyjnych*, Wydawnictwo Naukowe Uniwersytetu Śląskiego, Katowice 1989, s. 75; see also M. Chudzik, *Komentarz do art.2 ustawy o terminach zapłaty w transakcjach handlowych*, źródło: Lex Omega Interanet 2015.

⁹ See more W. J. Katner, *Komentarz do art. 45 Kodeksu cywilnego*, źródło: Lex Omega Intranet 2015.

¹⁰ It is more correct to use the term «right» – non-material property rights or intangible assets.

pression and the subject on which the painting is usually painted (for example, canvas and frames) does not have any value comparing with the value of mentioned painting. Hence, this distinction works for such good as a book, an album, music and movie CD or DVD, a computer diskette or disk, architectural design documentation, description of the invention, the description of a mathematical formula, drawing etc¹¹. The scope of the examples relating to intangible products in the above expressed meaning covers them within the limits of copyright law. In the light of intellectual property, it is obvious that only rights matter and not the material goods.

In the Civil Code the Polish legislator extends the scope of application of the provisions relating to the property to the sale of energy and rights¹². A wide range of different legal regulations to determine the legal status of intangible products is both helpful and complicated. For example, in accounting regulations intangible items can be treated as part of such legal institutions as current assets, fixed assets and intangible assets¹³.

In the Act of 18 July 2002 on electronic services¹⁴ and the Act of 5 July 2002 on the protection of certain electronically supplied services based on conditional access¹⁵ services are described as a subject of civil contract. Of course, these regulations should be treated as *lexspecialis* in relation to the provision of the Civil Code, which does not explain the legal status of intangible products in the context of e-commerce in the light of civil law. As we see with intangible products in civil law, we have more questions than answers. For example, we do not regulate what should happen with our emails and other electronic products after our death. Mostly all these electronic products (personal information) are left in «electronic clouds» (see in publications – cloud computing¹⁶). These electronic products can consist of various informa-

¹¹ W. J. Katner, Komentarz do art. 45 Kodeksu cywilnego, źródło: Lex Omega Intranet 2015.

¹² Art. 555 Civil Code; patrz. see also discussion at L. Sobolewski, Umowa opcji zbycia lub nabycia instrumentów finansowych, Przegląd Ustawodawstwa Gospodarczego 1998.1.4

¹³ See the Accounting Act of 29.09.1994 – Dz.U.2009.152.1223.

¹⁴ Dz.U.2002.144.1204.

¹⁵ Dz.U.2002.126.1068.

¹⁶ Cloud computing is a phrase used to describe a variety of computing concepts that involve a large number of computers connected through a real-time communication network such as the Internet [1] In science, cloud computing is a synonym for distributed computing over a network, and means the ability to run a program or application on many connected computers at the same time. The phrase also more commonly refers to network-based services, which appear to be provided by real server hardware, and are in fact served up by virtual hardware, simulated by software running on one or more real machines. Such virtual servers do not physically exist and can therefore be moved around and scaled up (or down) on the fly without affecting the end user – arguably, rather like a cloud. Source: http://en.wikipedia.org/wiki/Cloud_computing [last visited: 15.10.2015]; see also Hon, W. Kuan and Millard, Christopher and Walden, Ian, The Problem of 'Personal Data' in Cloud Computing – What Information is Regulated? The Cloud of Unknowing, Part 1 (March 10, 2011).

tion including images, electronic computer programs and other information, which can be very important for testators and their families. Probably, since there is not any court decision on this matter, the abovementioned problem is of interest to a state legislator. For example, in criminal law in Poland and other countries there is a well-known problem of criminal responsibility in terms of stealing virtual items in games like MMORPGs¹⁷ or game Second Life¹⁸. We cannot limit our imagination to intangible goods (virtual items) because the examples presented above show us if we should also regulate virtual stealing or even virtual rape¹⁹, for example.

International Data Privacy Law (2011) 1 (4): 211–228; Queen Mary School of Law Legal Studies Research Paper No. 75/2011. Available at SSRN: <http://ssrn.com/abstract=1783577> or <http://dx.doi.org/10.2139/ssrn.1783577> [last visited: 15.12.2013]; see also discussion about ownership of intangible items at Reed, Chris, Information 'Ownership' in the Cloud (March 2, 2010). Queen Mary School of Law Legal Studies Research Paper No. 45/2010. Available at SSRN: <http://ssrn.com/abstract=1562461> [last visited: 15.10.2015]; right now is a variety of cloud computing services – which are available for most users around the world – for example Icloud, Egnyte, Google Apps, OpenDrive, Dropbox, Amazon Cloud Drive and others. See more information on official websites of cloud computing services providers.

¹⁷ Massively multiplayer online role-playing game (MMORPG) mixes the genres of role-playing video games and Massively multiplayer online games, possibly in the form of web browser-based games, in which a very large number of players interact with one another within a virtual world.

As in all RPGs, players assume the role of a character (often in a fantasy world or science-fiction world) and take control over many of that character's actions. MMORPGs are distinguished from single-player or small multi-player online RPGs by the number of players, and by the game's persistent world (usually hosted by the game's publisher), which continues to exist and evolve while the player is offline and away from the game. MMORPGs are played throughout the world. Worldwide revenues for MMORPGs exceeded half a billion dollars in 2005, and Western revenues exceeded US\$1 billion in 2006. In 2008, Western consumer spending on subscription MMOGs grew to \$1.4 billion. World of Warcraft, a popular MMORPG, has more than 8 million subscribers as of March 2013. Star Wars: The Old Republic, released in 2011, became the world's 'Fastest-Growing MMO Ever' after gaining 1 million subscribers within the first three days of its launch. Source: http://en.wikipedia.org/wiki/Massively_multiplayer_online_role-playing_game [last visited 15.10.2015]; see also Arias, Andrea Vanina, Life, Liberty and the Pursuit of Swords and Armor: Regulating the Theft of Virtual Goods. Emory Law Journal, Forthcoming. Available at SSRN: <http://ssrn.com/abstract=1012886> [last visited: 15.10.2015].

¹⁸ Second Life is an online virtual world developed by Linden Lab. It was launched on June 23, 2003. A number of free client programs, or Viewers, enable Second Life users to interact with each other through avatars (also called Residents). Residents can explore the world (known as the grid), meet other residents, socialize, participate in individual and group activities, and create and trade virtual property and services with one another. Second Life is intended for people aged 16 and over [last visited: 15.10.2015].

¹⁹ See Benjamin Duranske, Reader Roundtable: «Virtual Rape» Claim Brings Belgian Police to Second Life April 24th, 2007, Virtual Law / Legal Issues that impact

The classical expression of electronic commerce involves the sale of goods and services using electronic means of communication. In fact, it is sufficient to distinguish e-commerce from classical trade – when we make a declaration of a purchase via electronic form. In terms of sale of goods and services, the legislature is not precise. Commonly, the sale of goods is based on general provisions of the Civil Code relating to the contract of sale. In accordance with the provisions of the Civil Code, under a contract of sale the seller agrees to transfer to the buyer the ownership of goods and to pass the goods and the buyer agrees to pick up the goods passed to him and pay the seller the price. In civil law the principle of freedom of contract²⁰ is applied (for example, in the light of principle of freedom of contract parties have freedom to sign a contract; freedom to choose a contractor; freedom to structure the content of the agreement and freedom to choose the form of the contract)²¹ and both goods and services can be the subject of sales contract in classical trade. At the same time, more complicated legal relations can be connected with goods and services as the subject of the agreement. A classical example of this type of agreement may be a sale of a computer program with technical support for this program for a limited time. A different way of service delivery can be presented in light of the so-called civil law service contracts, which in legal theory and practice may be similar to the agency agreements, and construction contracts, for example. Therefore, a sample analysis of legal relations and the subject of the contract – to determine whether the subject is a good or a service will bring different legal consequences in the light of civil law. Just as other consequences may arise, for example, from the contract of sale and services contract.

In electronic commerce classical problems related to classical trade with its context of goods and services are not applicable. Because in terms of civil law, in fact, in different jurisdictions and even different regulations within one jurisdiction a legislator treats this kind of trade as a sale of goods or services.

Conducting research to determine the content of e-commerce is also difficult for reasons of terminology used in different languages. Many different

virtual worlds source: <http://virtuallyblind.com/2007/04/24/open-roundtable-allegations-of-virtual-rape-bring-belgian-police-to-second-life/> [last visited: 15.10.2015].

²⁰ See more about the scope of freedom of contract in the light of Polish law – at B. Gessel-Kalinowska vel Kalisz, *Zasada swobody umów jako naczelna zasada prawa zobowiązań*, [w:] *Oświadczenia i zapewnienia w umowie sprzedaży udziałów w spółce z ograniczoną odpowiedzialnością w świetle zasad swobody umów*, źródło: Lex Omega 2013; mostly discussed limits of freedom of contract are related with the problema of tax avoidance and tax evasions, see for example Administrative Court Decision 24.04.2003 – SA/Bk 1278/02.

²¹ Article 3531 of the Civil Code – Contracting parties may adjust the legal relationship at its discretion, as long as its content or purpose does not contradict the nature of institution, the law or other principles of law, see Machnikowski P., *Swoboda umów według art. 353¹ KC. Konstrukcja prawna*, Warszawa 2005; see also discussion on principle of freedom of contract at B. Gliniecki, *Umowa deweloperska. Konstrukcja prawna i zabezpieczenie wzajemnych roszczeń stron*, Warszawa 2012, źródło: Lex Omega Intranet 2015.

legal regulations and practices treat materialized and digitalized goods and services differently in the context of various branches of law²².

Realization of sale of goods and services via electronic means of communication can be divided into two categories: the first one is the sale of goods (material, in physical form) through a web page seller and the second one is the sale of «electronic products (software, movies, music, etc.)» also by a web page seller. Nowadays sample examples look more complicated in the light of law. Let us assume that an average computer user Jan Kolwalski, residing in Gdansk, decided to use a trial²³ version of an antivirus program. This means that if he is satisfied with the antivirus program, he will get the required authorization data from the producer of the antivirus program after the transmission of information about his payment card (credit card). This will allow the user to continue the unrestricted use of this software. For our example, we assume that the software has been created by the company located in Russia and was available for download on the Internet from servers located in several countries. The country location of the server from which Jan Kowalski downloaded the program was South Africa²⁴. In the course of his web research the computer user used the Internet Explorer web browser developed by Microsoft and used the Internet service provider (ISP) based in Warsaw.

The abovementioned example highlights the main feature of e-commerce: it takes place in an environment without geographical boundaries. Thus, the question is if national law can influence the sale of something (goods or services) where it is extremely difficult to get answers to jurisdiction issues.

²² See examples from tax law perspective at P. Rendahl, Cross-Border Consumption Taxation of Digital Supplies, IBFD 2009, p. 123–135.

²³ Shareware (also termed trialware or demoware) is proprietary software that is provided to users on a limited basis and only for a certain limited trial basis and pursuant to a license which restricts any commercial benefit, use or exploitation of the software. While there may not be an initial up front payment, the license pursuant to which the software is provided limits and restricts usage and typically restricts any distribution for commercial purposes and is often limited by any combination of functionality, availability (it may be functional for a limited time period only), or convenience (the software may present a dialog at startup or during usage, reminding the user to purchase it; «nagging dialogs»). Shareware is often offered as a download from an Internet website or as a compact disc included with a periodical such as a newspaper or magazine. Shareware is a portmanteau word combining share and software. The rationale behind shareware is to give potential users the opportunity to try out the program on a limited basis for a limited time and judge its usefulness before purchasing a license for the full version of the software. Firms with superior software thus have an incentive to offer samples, except if their product is already well known, or if they do not want to be listed in direct competition with other products on shareware repositories. Source: <http://en.wikipedia.org/wiki/Shareware> [last visited: 15.10.2015].

²⁴ Usually a computer user gets quite a long computer list with computer servers located in different countries and he is free to choose the server located in the necessary country from the list.

Analyzing the problem of electronic commerce content, we should refer to international regulations. The following could be mentioned as examples: the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)²⁵; Convention 80/934/ECC on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980²⁶, 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters²⁷; 88/592/EEC: Convention on jurisdiction and the enforcement of judgments in civil and commercial matters – Done at Lugano on 16 September 1988 on 16 September 1988²⁸; Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters²⁹. As a supplement to the above-mentioned regulations there can be drafted by the European Council the Proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law³⁰.

These are the examples of international regulations relating to the broad terms of international trade issues, and the above-mentioned list cannot be treated as a whole legislation governing the sale of international goods and services. As a starting point in legal research and practice, we can try to apply «classical» international regulations to the international electronic commerce. However, we admit that in the context of international regulations we also have disputes on the division between goods and services in their materialized meaning. Hence, there will be questions on application of international regulations. For example, the Vienna Convention indicates that provisions of the Convention will not apply to contracts in which obligations of the party who furnishes the goods consists in the supply of labor or ser-

²⁵ See text of the convention and explanatory note at <http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf> [last visited: 15.10.2015].

²⁶ See text of the convention at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41980A0934:EN:NOT> [last visited 15.10.2015].

²⁷ See text of the convention at [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41968A0927\(01\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41968A0927(01):EN:NOT) [last visited: 15.10.2015].

²⁸ See text of the convention at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41988A0592:En:HTML> [last visited 15.10.2015].

²⁹ See text of Council Regulation at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001R0044:EN:NOT> [last visited: 15.10.2015]

³⁰ See more on official website – Justice – Newsroom at http://ec.europa.eu/justice/newsroom/news/20111011_en.htm [last visited: 15.11.2013]; see also Eidenmueller, Horst and Jansen, Nils and Kieninger, Eva-Maria and Wagner, Gerhard and Zimmermann, Reinhard, The Proposal for a Regulation on a Common European Sales Law: Deficits of the Most Recent Textual Layer of European Contract Law (May 1, 2012). *Edinburgh Law Review*, Vol. 16, No. 3, pp. 301–357, September 2012; Max Planck Private Law Research Paper No. 12/14. Available at SSRN: <http://ssrn.com/abstract=2118570> [last visited: 15.10.2015] or Kornet, Nicole, The Common European Sales Law and the CISG – Complicating or Simplifying the Legal Environment? (February 28, 2012). Maastricht European Private Law Institute Working Paper 2012/4. Available at SSRN: <http://ssrn.com/abstract=2012310> or <http://dx.doi.org/10.2139/ssrn.2012310> [last visited: 15.10.2015].

vices. Just as the title of the Convention states, regulation covers the legal relations concerning the international sale of goods. In turn, a wider range of adjustment of the regulation can be founding further provisions where as a subject of the contract can also be services. The uncertainty in limits of separation of goods and services was already indicated in the literature³¹. The issue becomes more complicated after further consideration in terms of the new United Nations Convention on the Use of Electronic Communications in International Contracts³². Currently not many countries have joined the Convention, and the provisions of the Convention do not define the concept of international trade and its components. The application of the Vienna Convention in electronic commerce and application developed by the same international organization of model law on electronic commerce³³ is still a subject of academic discussion³⁴. In the light of these regulations, we cannot get answers whether the electronic product is a service or a product or commodity, which in turn raises questions about the application of international regulations. The case of a possible separation of goods and services in the context of electronic commerce, in turn, raises another problem related to identification of the electronic products (digitized products), which are the subject of international sales. For example, in electronic commerce meeting the needs of watching a movie may be realized by providing the physical media on which the movie is saved, or by sending the file (movie) electronically and through streaming movie via Internet – the so-called streaming media (streaming movie)³⁵. A feature of streaming media is their lack of an Internet user's hard drive that uses this media, which distinguishes it from various

³¹ See for example P. Schlechtriem, Requirements of Application and Sphere of Applicability of the CISG Victoria University of Wellington Law Review (2005/4) 781–794, source: <http://cisgw3.law.pace.edu/cisg/biblio/slechchtriem9.html> [last visited: 15.10.2015]; see also art. 3 of Viena Convention.

³² See text of regulation at http://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf [last visited: 15.11.2013].

³³ See text of regulation – UNCITRAL Model Law on Electronic Commerce – at http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf [last visited: 15.10.2015].

³⁴ See more J. Ziegel, 'The Future of the International Sales Convention from a Common Law Perspective' (2000) 6 New Zealand Business Law Quarterly 336, 345, source: <http://cisgw3.law.pace.edu/cisg/biblio/ziegel3.html> [last visited: 15.11.2013]; see also I. Carr, International Trade Law, London and New York 2010, p. 103 – 125; see also – scope of the model law on electronic commerce on American law and other discussed issues related to international sales of goods (New York, 2005), w Boss, Amelia H., Electronic Commerce and the Symbiotic Relationship Between International and Domestic Law Reform (April 1998). In the Tulane Law Review, Vol. 72, No. 6, 1998. Available at SSRN: <http://ssrn.com/abstract=127308> or <http://dx.doi.org/10.2139/ssrn.127308> [last visited: 20.10.2015].

³⁵ Streaming media is multimedia that is constantly received by and presented to an end-user while being delivered by a provider. Its verb form, «to stream», refers to the process of delivering media in this manner; the term refers to the delivery method of the medium rather than the medium itself. Source: http://en.wikipedia.org/wiki/Streaming_media [last visited: 15.10.2015].

peer to peer³⁶ services or the possibility of downloading files from the Internet (mostly web sites). The problem of streaming media generally occurs in the context of copyright laws and right now is not evaluated in the prism of electronic sales³⁷. The nature of the legal relationship is more complex, and streaming media can be treated as a part of copyright licenses fee (royalties)³⁸ which can have different legal consequences in different branches of law, for example, civil and tax law.

The meaning of electronic commerce in the light of tax law

Besides the above presented examples of distinguishing goods and services in the context of electronic trade, it is also important to take a closer look at legal consequences in tax law, in particular in the context of indirect taxes. In tax law, the European Union and other countries (outside the EU) have developed different rules for taxation of value added supply of goods and provision of services. Directive on the taxation of electronic services [called in the literature Directive on VAT for e-commerce] was introduced by the Council on 7 May 2002³⁹. The legal regulation was to adapt the Sixth Directive on VAT to technological progress and to ensure the fair competition of enterprises from EU member countries with companies from outside the EU. In reports and other documents of the EU Commission (in particular in the report of 04.03.1998) concerning the VAT treatment of electronic transactions both goods (including the form of material and digitalized products) and services were determined as a subject of commerce. The definition of e-commerce and its content presented by the EU Commission covers the characteristics and nature from other legal definitions of e-commerce develo-

³⁶ A peer-to-peer (P2P) network is a type of decentralized and distributed network architecture in which individual nodes in the network (called «peers») act as both suppliers and consumers of resources, in contrast to the centralized client-server model where client nodes request access to resources provided by central servers. Source: http://en.wikipedia.org/wiki/Peer_to_peer [last visited: 15.10.2015].

³⁷ See for examples discussion related to peer to peer copyright issues Carrier, Michael A., Copyright and Innovation: The Untold Story (October 24, 2012). 2012 Wisconsin Law Review 891. Available at SSRN: <http://ssrn.com/abstract=2099876> [last visited: 15.10.2015].

³⁸ Royalty-free, or RF, refers to the right to use copyrighted material or intellectual property without the need to pay royalties or license fees for each use or per volume sold, or some time period of use or sales. Source: <http://en.wikipedia.org/wiki/Royalty-free> [last visited: 15.10.2015].

³⁹ See more information and background documents related to directive at – VAT on electronic services, source: http://ec.europa.eu/taxation_customs/taxation/vat/traders/e-commerce/ [last visited: 15.10.2015]; The Directive complements the international process at the OECD. The OECD principles on the taxation of e-commerce were agreed at a 1998 conference in Ottawa. Principles accepted by OECD – Neutrality, Efficiency, Certainty and Simplicity, Effectiveness and Fairness, Flexibility, see more at Electronic Commerce: Taxation Framework Conditions, A Report by the Committee on Fiscal Affairs, Ottawa 1998, source: http://www.biac.org/members/tax/BEPS/Ottawa_tax_Framework_923256.pdf [last visited: 15.10.2015].

ped by various international organizations. For the purposes of the regulation the category of «virtual» goods is emphasized, which in principle cannot be identified with the classical concepts of goods and services⁴⁰. Finally, both the documents and the Directive adopt the concept of treatment of «virtual» goods for the purposes of value added tax as the provision of services. A similar position is found in the post-conference theses of 8 October 1998 in the Report of the Committee on Fiscal Affairs – «A Borderless World: Realizing the Potential of Electronic Commerce», where it is stated that for the purpose of consumption taxes, the supply of digitized products should not be treated as a supply of goods⁴¹.

The range of electronic services for VAT in the EU is specified in Council Implementing Regulation (EU) No 282/2011 that was adopted by the Council of the European Union on 15 March 2011. The Regulation provided new implementing measures for Directive 2006/112/EC on the common system of value added tax. In accordance with Article 7 of the Regulation: 'Electronically supplied services' as referred to in Directive 2006/112/EC shall include services which are delivered over the Internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and impossible to ensure in the absence of information technology. It should cover, in particular, the following: (a) the supply of digitized products generally, including software and changes to or upgrades of software; (b) services providing or supporting a business or personal presence on an electronic network such as a website or a webpage; (c) services automatically generated from a computer via the Internet or an electronic network, in response to specific data input by the recipient; (d) the transfer for consideration of the right to put goods or services up for sale on an Internet site operating as an online market on which potential buyers make their bids by an automated procedure and on which the parties are notified of a sale by electronic mail automatically generated from a computer; (e) Internet Service Packages (ISP) of information in which the telecommunications component forms an ancillary and subordinate part (i.e. packages going beyond mere Internet access and including other elements such as content pages giving access to news, weather or travel reports; playgrounds; website hosting; access to online debates etc.); (f) the services listed in Annex I of the regulation. Electronically supplied services shall not, in particular, cover the following: (a) radio and television broadcasting services; (b) telecommunications services; (c) goods, where the order and processing is done electronically; (d) CD-ROMs, floppy disks and similar tangible media; (e) printed matter, such as books, newsletters, newspapers or journals; (f) CDs and audio cassettes; (g) videocassettes and DVDs; (h) games on a

⁴⁰ See at Interim report on the implications of electronic commerce for VAT and customs. 1998, source: http://ec.europa.eu/taxation_customs/resources/documents/interim_report_on_electric_commerce_en.pdf [last visited: 15.10.2015].

⁴¹ Electronic Commerce: Taxation Framework Conditions, A Report by the Committee on Fiscal Affairs, Ottawa 1998, source: http://www.biac.org/members/tax/BEPS/Ottawa_tax_Framework_923256.pdf [last visited: 15.11.2013].

CD-ROM; (i) services of professionals such as lawyers and financial consultants, who advise clients by e-mail; (j) teaching services, where the course content is delivered by a teacher over the Internet or an electronic network (namely via a remote link); (k) offline physical repair services of computer equipment; (l) offline data warehousing services; (m) advertising services, in particular as in newspapers, on posters and on television; (n) telephone help-desk services; (o) teaching services purely involving correspondence courses, such as postal courses; (p) conventional auctioneers' services reliant on direct human intervention, irrespective of how bids are made; (q) telephone services with a video component, otherwise known as videophone services; (r) access to the Internet and World Wide Web; (s) telephone services provided through the Internet. It must be admitted that it is difficult to call above-mentioned services as a legal definition of e-commerce. In fact, the tax law regulations related to electronic commerce in the EU, leaves this sphere without general definition⁴².

It is worth to emphasize that tax regulation of complex electronic services also introduces a comprehensive catalogue of services that will not be treated as electronic services for VAT purposes. In fact the choice of method of communication with the final consumer will have a decisive impact on the tax burden of VAT by satisfying the same needs (for example, the purchase of the program by the user on the CD and the purchase of the same program by downloading it from the website providers)⁴³.

In the tax literature and practice we can find many examples of problems related to the distinction of supplies of goods and services in the context of value added tax⁴⁴. The problem, in fact, applies to complex (mixed, composite supplies) supplies, which include both the supply of goods and services. An example might be the case of *Faaborg – GeltingLinien A/S v. Finanzamt Flensburg* (Case C-231/94)⁴⁵, in which the European Court of Justice explained that in order to determine whether serving meals on board of ships is a supply of goods or provision of services it shall have to take all circumstances arising out of the restaurant transaction. The Court held that if a number of additional activities related to the preparation accompanies the delivery of

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⁴² See for example D. M. Parrilli, *European VAT and Electronically Supplied Services*, International Tax Dialogue, source:http://www.itdweb.org/documents/European_VAT_and_Electronically_Supplied_Services_DPTI_010908.pdf [last visited: 02.09.2015].

⁴³ See more A. Bartosiewicz, R. Kubacki, *Komentarz do art.131, art.132, art.133, art.134 ustawy o podatku od towarów i usług*, Lex Omega Intranet 2015.

⁴⁴ See comparative analysis for EU, Canada and Australia at P. Rendahl, *Cross-Border Consumption Taxation of Digital Supplies*, IBFD 2009, p. 135 – 152; see also decision of administrative court in Poland – sygn. akt I FSK 499/06 oraz z dnia 2 grudnia 2008 r. sygn. akt I FSK 1946/07.

⁴⁵ See more information from Source: <http://curia.europa.eu/juris/showPdf.jsf?jsessionid=9ea7d2dc30db068846678baf4fb0a3d7c9da358b6695.e34KaxiLc3qMb40Rch0SaxqTbNn0?text=&docid=99983&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=43875> [last visited: 02.09.2015].

the goods (meal), and administration of this product (meal), then essentially we are dealing with the provision of services rather than the supply of goods.

The following cases can also serve as additional examples: (case C-41/04): *LevobVerzekeringen BV, OV Bank NV przeciwko Staatssecretaris van Financiën*⁴⁶ and (case C-111/05) *Aktiebolaget NN versus Skatteverket*⁴⁷.

Conclusion

It must be admitted that both in law and literature, there is a large variety of descriptions of e-commerce content and completely different concepts of treatment of electronic products. The beginnings of studies on e-commerce content are mostly based on comparing them with the real world products, in particular with the goods and services in terms of the classical (real) sense. The nature of legal institutions can allow us to make a thesis, which does not depend on the treatment of electronic products in different jurisdictions, that we should separate new legal institutions for electronic commerce regulation needs. These institutions got their own legal status and got new legal principles in the context of different branches of law. Acknowledging the lack of legal definition of electronic commerce in the Polish law, we should also pay attention to the differences in the definition of the various forms in various languages. In English the term most commonly used in literature, documents and legal regulations is the so called «*electronic commerce*», which is translated into Polish as electronic trade or electronic business. From the perspective of translation into the Polish language for non-legal purposes both terms are acceptable. In the context of definitions already developed by lawyers and economists it must be admitted that the term «e-business» is wider and its content covers the concept of «electronic trade». In turn, in the English language in order to avoid problems of language you would use the term «electronic trade».

⁴⁶ See more information Source: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004CC0041:EN:HTML> [last visited: 02.09.2015];

⁴⁷ Source: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005CJ0111:PL:HTML> [last visited: 02.09.2015].

Gdansk University (Poland)

Juchniewicz E., Dr

Gdynia Maritime University (Poland)

Stwol M., Dr

E-mail: e.juchniewicz@prawo.ug.edu.pl

Гданьский университет (Польша)

Юхневич Э., доктор юридических наук

Морской университет в Гдыне (Польша)

Ствол М., доктор юридических наук

E-mail: e.juchniewicz@prawo.ug.edu.pl