

## ELECTRONIC TRANSACTIONS AND ELECTRONIC COMMERCE BILL, 2013

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First draft: 11 June, 2013

# BILL

To promote legal certainty and enforceability to electronic transactions and electronic commerce, to grant legal recognition to electronic communications and writing, to provide for the legal effect of electronic signatures and secure electronic signatures, to make provision for the admissibility and evidentiary weight of electronic evidence, to provide for the time and place of the dispatch and receipt of electronic communications and electronic contract formation, transactions, to protect consumers in the on-line environment and to prohibit certain electronic marketing practices, to provide for the limitation of liability of service providers, and to provide for matters incidental to or connected with the foregoing.

ENACTED by the President and the Parliament of Zimbabwe.

## PART I

### PRELIMINARY

#### **1 Short title and date of commencement**

- (1) This Act may be cited as the Electronic Transactions and E-commerce Act [Chapter \*\*-\*\*], 2013.
- (2) This Act shall come into operation on a date to be fixed by the President by Statutory Instrument.

#### **2 Interpretation**

In this Act—

“addressee” of an electronic communication means a party who is intended by the originator to receive the electronic communication, but does not include a party acting as an intermediary in respect of that electronic communication;

“automated message system” means a pre-programmed system, or other automated system, used to: initiate an action; respond to electronic communications; or generate other performances in whole or in part without review or intervention by a party each time an action is initiated or a response is generated by the system;

“cache” means high-speed memory that stores data for relatively short periods of time in an information system in order to speed up data transmission or processing;

“consumer”, in respect of any particular goods or services, means a person who has entered into a transaction with a supplier in the ordinary course of the supplier’s business, unless the transaction is exempt from the application of this Act in terms of section \*(\*) ;

“consumer” means a natural person and/or a non-profit organisation that purchases goods and services for the direct satisfaction of individual needs or wants or the collective needs of members of a community;

or

“consumer” means any natural person who enters or intends entering into an electronic transaction with a supplier as the end user of the goods or services offered by that supplier;

“data message” means information generated, sent, received, or stored by electronic, magnetic, optical or similar means, including but not limited to electronic data interchange (EDI), electronic mail, mobile communications (such as SMS messages) and audio or video recordings;

“direct costs” mean costs incurred such as transport costs or postage when returning goods or services but excludes any handling fees;

“e-government services” means any public service provided by means of electronic communications by any public office or any automated means intended for public service;

“electronic record” means a record in the form of a stored electronic communication;

“electronic communication” means communication made by means of a data message;

“electronic data interchange (EDI)” means the electronic transfer of structured data from one information system to another in accordance with agreed standards;

“electronic signature” means data, including an electronic sound, symbol or process, executed or adopted to identify a party and to indicate that party’s approval or intention in respect of the information

contained in the electronic communication and which is attached to or logically associated with such electronic communication;

“electronic transaction” means a transaction, action or set of actions of either a commercial or non-commercial nature, and includes the provision of information and/or e-government services;

“intermediary” with respect to a particular electronic communication, means a person who, on behalf of another person, sends, receives or stores that electronic communication or provides other services with respect to that electronic communication;

“information system” means a device or group of interconnected or related devices, including the Internet, one or more which, pursuant to a program, performs automatic processing of data/or any other functions;

“information system services” means providing the connection and network facilities necessary for transmitting, hosting and routing electronic communications between or among points specified by a user of data of the user’s choosing, without modification to the content of the data sent, stored or received;

“Minister” means \*\*\*;

“originator” of an electronic communication means a person or party by whom, or on whose behalf, the electronic communication purports to have been sent or generated prior to storage, if any, but it does not include a person or party acting as an intermediary with respect to that electronic communication;

“place of business” means any place where a party maintains a non-transitory establishment to pursue an economic activity other than the temporary provision of goods or services out of a specific location;

“program” means a set of instructions fixed or stored in any manner or form and which, when used directly or indirectly in an automated system, directs its operations to bring about a result;

“secure electronic signature” means a signature duly recognised in terms of subsection 8(1), which is created and can be verified through the application of a security procedure or combination of security procedures that ensures that an electronic signature:

- (a) is unique to the signer for the purpose for which it is used;
- (b) can be used to identify objectively the signer of the electronic communication;
- (c) was created and affixed to the electronic communication by the signer or using a means under the sole control of the signer; and
- (d) was created and is linked to the electronic communication to which it relates in a manner such that any changes in the electronic communication would be revealed.

“service provider” means a person or party that makes information system services available.

### **3 Application of Act**

(1) This Act shall apply in respect of any electronic transaction or electronic communication used or intended to be used in relation to an electronic transaction, except where, and if applicable, to the extent, that it is excluded in subsection 6(4) and subsection 7(5) of this Act.

(2) This Act must not be interpreted so as to exclude any statutory law or the common law from being applied to, recognising or accommodating electronic transactions, electronic communications or any other matter provided for in this Act.

(3) This Act does not limit the operation of any law that expressly authorises, prohibits or regulates the use of electronic communications, including any requirement by or under a law for information to be posted or displayed in a specified manner, or for any information or document to be transmitted by a specified method.

(4) Nothing in this Act shall be construed as:

- (a) requiring any person to use or to accept electronic communications; or
- (b) prohibiting a person engaging in an electronic transaction or e-commerce from establishing reasonable requirements about the manner in which it will accept electronic communications.

(5) Notwithstanding the provisions of subsection (4) above, a person's agreement to use or accept electronic communications may be inferred from such person's conduct.

(6) Parties may agree to exclude the application of this Act between themselves (*inter partes*) or they may derogate from and or vary the effect of sections 6 and 7 and/or Part III by agreement.

(7) The Minister may by order modify the provisions of subsection (2) by adding, deleting or amending any class of transactions or matters.

## PART II

### LEGAL RECOGNITION AND EFFECT OF ELECTRONIC COMMUNICATIONS

#### 4 Legal recognition of electronic communications

A data message shall not be denied legal effect, validity or enforceability solely on the ground that it is in the form of an electronic communication.

#### 5 Recognition by parties of electronic communications

Between the originator and the addressee of an electronic communication, a declaration of will, other statement or action shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of an electronic communication.

#### 6 Writing

(1) Where a law requires information to be in writing, that requirement is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference.

(2) Subsection 1 applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the information not being in writing.

(3) For the purposes of this section, an electronic communication shall include:

- (a) making an application;
- (b) making or lodging a claim;
- (c) giving, sending or serving a notification, statement or declaration;
- (d) lodging a return;
- (e) making a request;

- (f) making a declaration or demand;
  - (g) lodging or issuing a certificate;
  - (h) making, varying or cancelling an election;
  - (i) lodging an objection; giving a statement of reasons; and
  - (j) such other action/s as may be prescribed.
- (4) The provisions of this section shall not apply to the requirement of writing for:
- (a) the conveyance of immovable property or a contract for the transfer of any interest in immovable property;
  - (b) documents of title;
  - (c) the creation, performance or enforcement of an indenture, declaration of trust or power of attorney with the exception of constructive and resulting trusts;
  - (d) a contract for the long-term lease of immovable property in excess of 10 years;
  - (e) the execution, retention and presentation of a will or codicil;
  - (f) documents relating to family law and personal status the execution of a bill of exchange; and
  - (g) such other documents or instrument as may be prescribed by Regulation.

## **7      Signature**

- (1) If a law requires the signature of a person, an electronic signature will be deemed to be valid, provided the electronic signature complies with the requirements as prescribed by Regulation.
- (2) The requirements for an electronic signature referred to in subsection 1 above will be met if:
- (a) the method is used to identify the person and to indicate the person's intention in regard to the information communicated; and
  - (b) at the time the method was used, the method was as reliable as was appropriate for the purposes for which the information was communicated in light of all the relevant circumstances.
- (3) Where two persons or parties agree to make use of electronic signatures they may agree to use any method of signing as they deem appropriate.
- (4) Subsection (1) applies whether the requirement referred to therein is in the form of an obligation or whether the law simply provides consequences for the absence of a signature.
- (5) The provisions of this section do not apply to the requirement for a signature for the following acts:
- (a) the offer or acceptance of a contract for the alienation of immovable property;
  - (b) the signing of a contract for the long-term lease of immovable property in excess of 10 years;
  - (c) the creation or declaration of trust or power of attorney with the exception of constructive and resulting trusts;
  - (d) the execution, retention and presentation of a will or codicil;
  - (e) the execution of a bill of exchange;
  - (f) the execution of documents relating to family law and personal status; and

(g) such other laws or statutes as may be prescribed by Regulation.

## **8 Creation and recognition of secure electronic signature**

- (1) Where a secure electronic signature has been used, the signature is regarded as being a valid electronic signature and having been applied properly, unless the contrary is proved.
- (2) Electronic signatures that are not secure electronic signatures are not subject to the presumptions set out in subsection (1) above and section 19 below.

## **9 Regulation of Certification Authorities**

- (1) The Minister may make regulations for the regulation and licensing of certification authorities and to define when an authentication product qualifies as a secure electronic signature.
- (2) Without prejudice to the generality of subsection (1), the Minister may make regulations for or with respect to:
  - (a) the technical requirements that an authentication product must meet that is consistent with generally recognized international technical standards, be it based on asymmetric crypto system, biometrics or a combination of these or other authentication methods to qualify as secure electronic signatures;
  - (b) applications for licences or renewal of licences of certification authorities and their authorised representatives and matters incidental thereto;
  - (c) the activities of certification authorities including the manner, method and place of soliciting business, the conduct of such solicitation and the prohibition of such solicitation of members of the public by certification authorities which are not licensed;
  - (d) the standards to be maintained by certification authorities;
  - (e) prescribing the appropriate standards with respect to the qualifications, experience and training of applicants for any licence or their employees;
  - (f) prescribing the conditions for the conduct of business by a certification authority;
  - (g) providing for the content and distribution of written, printed or visual material and advertisements that may be distributed or used by a person in respect of a digital certificate or key;
  - (h) prescribing the form and content of a digital certificate or key;
  - (i) prescribing the particulars to be recorded in, or in respect of, accounts kept by certification authorities;
  - (j) providing for the appointment and remuneration of an auditor appointed under the regulations and for the costs of an audit carried out under the regulations;
  - (k) providing for the establishment and regulation of any electronic system by a certification authority, whether by itself or in conjunction with other certification authorities, and for the imposition and variation of such requirements, conditions or restrictions as may be applicable;

- (l) the manner in which a holder of a licence conducts its dealings with its customers, conflicts of interest involving the holder of a licence and its customers, and the duties of a holder of a licence to its customers with respect to digital certificates;
  - (m) the recommended reliance limits certification authorities may specify;
  - (n) the limitation of liability of licensed certification authorities for any loss caused by reliance on a false or forged secure electronic signature;
  - (o) the quality of repositories and the services they provide including provisions for the standards, licensing or accreditation of repositories
  - (p) prescribing forms for the purposes of the regulations;
  - (q) prescribing fees to be paid in respect of any matter or thing required for the purposes of this Act or the regulations; and
  - (r) any other matter deemed to be necessary for the efficient functioning of the matters addressed in the Part.
- (3) Regulations made under this section may provide that a contravention of a specified provision shall be an offence and may provide penalties not exceeding a fine of *[to be specified]* or imprisonment for a term not exceeding *[to be specified]* months or both.
- (4) The Minister may, by regulations, recognise certification authorities outside Zimbabwe that satisfy the prescribed requirements for any of the following purposes:
- (a) the recognition of foreign authentication products and methods as secure electronic signatures;
  - (b) the recommended reliance limit, if any, specified in a digital certificate issued by the certification authority;
  - (c) the presumptions referred to in section 19.

## **10 Incorporation by reference**

Information shall not be denied legal effect, validity or enforceability solely on the ground that it is not contained in the electronic communication purporting to give rise to such legal effect, validity or enforceability, but is merely referred to in that electronic communication.

## PART III

### ELECTRONIC TRANSACTIONS

## **11 Formation and validity of contracts**

- (1) Where electronic communications are used in the formation of a contract, that contract shall not be denied legal effect, validity or enforceability on the sole ground that an electronic communication was used to make an offer or to accept an offer for that purpose.
- (2) A proposal to conclude a contract made through one or more electronic communications, which is not addressed to one or more specific parties but is generally accessible to parties making use of information systems (including proposals that make use of interactive applications for the placement of

orders through such information systems) is to be considered as an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance.

## **12 Variation by agreement**

The provisions under Part 5 shall apply, unless the parties involved in generating, sending, receiving, storing or otherwise processing electronic communications, have agreed otherwise.

## **13 Time of dispatch of electronic communications**

(1) The dispatch of an electronic communication occurs when it enters an information system outside the control of the originator or of the person who sent the electronic communication on behalf of the originator.

(2) Where the originator and the addressee are in the same information system, the dispatch of electronic communication occurs when it is capable of being retrieved by the addressee.

## **14 Time of receipt of electronic communications**

(1) If the addressee has designated an information system for the purpose of receiving electronic communications, the time of receipt of an electronic communication is determined as follows:

- (a) at the time when the electronic communication enters the designated information system; or
- (b) when the electronic communication is sent to an information system of the addressee that is not the designated information system, at the time when the electronic communication is capable of being retrieved by the addressee at that address and the addressee becomes aware that the electronic communication has been sent to that address.

(2) An electronic communication is deemed to be capable of being retrieved by the addressee for the purposes of subsection 13(2) and paragraph b of subsection 14(1) when it reaches the addressee's electronic address.

(3) If the addressee has not designated an information system, receipt occurs when the electronic communication is retrieved by the addressee, or should reasonably have been retrieved by the addressee.

## **15 Place of dispatch and receipt of electronic communications**

(1) An electronic communication is deemed to have been dispatched at the place where the originator has its place of business, and is deemed to be received at the place where the addressee has its place of business.:

(2) For the purposes of subsection (1) above:

- (a) if the originator or the addressee has more than one place of business, the place of business is:
  - (i) that which has the closest relationship to the underlying transaction having regard to the circumstances known or contemplated by the parties at any time before or at the conclusion of the contract; or

- (ii) where there is no underlying transaction, the principal place of business.
  - (b) If the originator or the addressee does not have a place of business, reference is to be made to that person's habitual residence.
- (3) This section shall apply notwithstanding that the place where the information system supporting an electronic address is located may be different from the place where the electronic communication is deemed to be dispatched or deemed to be received under this section.

## **16 Time of contract formation**

- (1) Where parties conclude a contract by means of electronic communications, such contract is formed at the time when and the place where the acceptance of the offer becomes effective.
- (2) An offer in the form of an electronic communication becomes effective at the time it is received by the offeree.
- (3) The acceptance of an offer by means of an electronic communication becomes effective at the time and place that it is received by the offeror.

## **17 Automated message systems**

- (1) A contract formed by the interaction of an automated message system and a person, or by the interaction of automated message systems, shall not be denied legal effect, validity or enforceability on the sole ground that no natural person reviewed each of the individual actions carried out by the systems or the resulting contract.
- (2) Where a natural person makes an input error of a material nature in an electronic communication exchanged with the automated message system of another party and the automated message system does not provide the person with an opportunity to correct the error, that person, or the party on whose behalf that person was acting, has the right to withdraw the electronic communication in which the input error was made if:
  - (a) the person, or the party on whose behalf that person was acting, notifies the other party of the error as soon as possible after having learned of the error and indicates that he or she made an error in the electronic communication and wishes to cancel the contract or cancel the input error;
  - (b) the person, or the party on whose behalf that person was acting, takes reasonable steps, including steps that conform to the other party's instructions, to return the goods or services received, if any, as a result of the error or, if instructed to do so, to destroy the goods or services, or to cancel the input error;
  - (c) the person, or the party on whose behalf that person was acting, has not used or received any material benefit or value from the goods or services, or the input error, if any, from the other party;
  - (d) if a person has paid for any goods or services prior to exercising a right referred to in subsection 1, such person is entitled to a full refund of such payment, and the refund shall be made within 30 days of the date of cancellation.

(3) Nothing in this section affects the application of any rule of law that may govern the consequences of any errors made during the formation or performance of the type of contract in question other than an input error that occurs in the circumstances referred to in subsection 2.

**PART IV**  
**ELECTRONIC COMMERCE**

**18 Attribution of electronic communications**

An electronic communication is that of the originator if it was sent by:

- (a) the originator personally;
- (b) a person who had authority [is duly authorised] to act on behalf of the originator in respect of that electronic communication; or
- (c) an information system programmed by or on behalf of the originator to operate automatically unless it is proved that the information system did not properly execute such programming.

**19 Attribution of secure electronic signatures**

A secure electronic signature is deemed to have been applied by the holder of the secure electronic signature, unless the contrary is proved.

**20 Original information**

(1) Where the law requires information to be presented in its original form, that requirement is met by an electronic communication if:

- (a) there exists a reliable assurance as to the integrity of the information from the time when it was first generated in its final form, as an electronic communication or otherwise; and
- (b) where it is required that information be presented, that information is capable of being displayed in the form of an electronic communication to the person to whom it is to be presented.

(2) Sub-section 1 applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the information not being presented or retained in its original form.

(3) For the purposes of paragraph (a) of subsection 1:

- (a) the criteria for assessing integrity shall be whether the information has remained complete and unaltered, apart from the addition of any endorsement; and any change which arises in the normal course of communication, storage and display; and
- (b) the level of reliability shall be assessed in the light of the purpose for which the information was generated and in the light of all the relevant circumstances.

**21 Admissibility and evidential weight of electronic communications**

(1) In any legal proceedings, nothing in the application of the rules of evidence shall apply so as to deny the admissibility of an electronic communication in evidence:

- (a) on the sole ground that it is in the form of an electronic communication; or
  - (b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.
- (2) Information in the form of an electronic communication shall be given due evidential weight.
- (3) In assessing the evidential weight of an electronic communication, regard shall be had to:
- (a) the reliability of the manner in which the electronic communication was generated, stored or communicated;
  - (b) the reliability of the manner in which the integrity of the electronic communication was maintained;
  - (c) the manner in which its originator was identified; and
  - (d) any other relevant factor.
- (4) An electronic communication made by or on behalf of a person in the ordinary course of business, or a copy or printout of, or an extract from such electronic communication certified to be correct, is admissible in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self-regulatory organisation or any other law or the common law, as evidence of the facts contained in such record, copy, printout or extract against any person, provided:
- (a) the affidavit is made by the person who was in control of the system at the time when the electronic communication was created;
  - (b) the affidavit contains sufficient information on the following:
    - (i) the reliability of the manner in which the electronic communication was generated, stored or communicated;
    - (ii) the reliability of the manner in which the integrity of the electronic communication was maintained;
    - (iii) the manner in which the originator of the electronic communication was identified; and
    - (iv) the reliability of the information system.

## **22      Retention of records**

- (1) Where the law requires that certain documents, records or information be retained, that requirement is met by electronic record retention, providing that the following conditions are satisfied:
- (a) the electronic record contained therein is an electronic communication;
  - (b) the electronic record is retained in the format in which it was generated, sent or received, or in a format which can be demonstrated to represent accurately the information generated, sent or received; and
  - (c) such electronic record is retained in a form that enables the identification of the origin and destination of an electronic record or electronic communication and the date and time when it was first generated, sent or received, and the date and time it was first retained.
- (2) An obligation to retain documents, records or information in accordance with subsection 1 does not extend to any information of which the sole purpose is to enable the message to be sent or received.

(3) A person may satisfy the requirement referred to in subsection 1 by using the services of any other person, provided that the conditions set forth in paragraphs (a), (b) and (c) of subsection 1 are met.

## **23 Production of document or information**

(1) Where a law requires a person to produce a document or information, that requirement is met if the person produces, by means of an electronic communication, an electronic form of that document or information, and if:

- (a) considering all the relevant circumstances at the time that the electronic communication was sent, the method of generating the electronic form of that document provided a reliable means of assuring the maintenance of the integrity of the information contained in that document; and
- (b) at the time the electronic communication was sent, it was reasonable to expect that the information contained therein would be readily accessible so as to be usable for subsequent reference.

(2) For the purposes of subsection 1, the integrity of the information contained in a document is maintained if the information has remained complete and unaltered, except for

- (a) the addition of any endorsement; or
- (b) any immaterial change, which arises in the normal course of communication, storage or display.

## **24 Notarisation, acknowledgement and certification**

(1) Where a law requires a signature, statement or document to be notarised, acknowledged, verified or made under oath, that requirement is met if the secure electronic signature of the person authorised to perform those acts is attached to, incorporated in or logically associated with the electronic signature or electronic communication.

(2) Where a law requires or permits a person to provide a certified copy of a document and the document exists in electronic form, that requirement is met if the person provides a printout certified to be a true reproduction of the document or information.

(3) Where a law requires or permits a person to provide a certified copy of a document and the document exists in paper or other physical form, that requirement is met if an electronic copy of the document is certified to be a true copy thereof and the certification is confirmed by the use of a secure electronic signature.

## **25 Other requirements**

(1) A requirement in a law for multiple copies of a document to be submitted to a single addressee at the same time is satisfied by the submission of a single electronic communication that is capable of being reproduced by that addressee.

(2) An expression in a law, whether used as a noun or verb, including the terms "document", "record", "file", "submit", "lodge", "deliver", "issue", "publish", "write in", "print" or words or expressions of similar effect, shall be interpreted so as to include or permit such form, format or action in relation to an electronic communication unless otherwise provided for in this Act.

(3) Where a seal is required by law to be affixed to a document and such law does not prescribe the method or form by which such a document may be sealed by electronic means, that requirement is met if the document indicates that it is required to be under seal and it includes the secure electronic signature of the person by whom it is required to be sealed.

(4) Where any law requires or permits a person to send a document or information by post or similar service, that requirement is met if an electronic form of that document or information is sent to the electronic address provided by the addressee.

## PART V

### CONSUMER PROTECTION

#### **26      Obligations of the supplier**

(1) A supplier offering goods or services for sale, for hire or for exchange by way of an electronic transaction shall make the following information available to consumers:

- (a) its full contact details, including its place of business, e-mail addresses and telefax number(s);
- (b) a sufficient description of the main characteristics of the goods or services offered by that supplier to enable a consumer to make an informed decision on the proposed electronic transaction;
- (c) the full price of the goods or services, including transport costs, taxes and any other fees or costs;
- (d) information regarding the payment system that is sufficiently secure with reference to accepted technological standards at the time of the transaction and the type of transaction concerned;
- (e) any terms of agreement and the manner and period within which consumers can access and maintain a full record of the transaction.

(2) The supplier shall provide the consumer with an opportunity: –

- (a) to review the entire electronic transaction;
- (b) to correct any mistakes; and
- (c) to withdraw from the transaction, before finally placing any order.

(3) If a supplier fails to comply with the provisions of sub-sections 1 or 2, the consumer may cancel the transaction within 14 days of receiving the goods or services under the transaction.

(4) If a transaction is cancelled in terms of subsection 3: –

- (a) the consumer shall return the performance of the supplier or, where applicable, cease using the services performed; and
- (b) the supplier shall refund all payments made by the consumer minus the direct cost of returning the goods.

## **27 Performance**

- (1) The supplier shall execute the order within 30 days after the day on which the supplier received the order, unless the parties have agreed otherwise.
- (2) Where a supplier has failed to execute the order within 30 days or within the agreed period, the consumer may cancel the agreement with seven days' written notice.
- (3) If a supplier is unable to perform in terms of the agreement on the grounds that the goods or services ordered are unavailable, the supplier shall immediately notify the consumer of this fact and refund any payments within 30 days after the date of such notification.

## **28 Cooling-off**

- (1) A consumer is entitled to cancel without reason and without penalty any transaction and any related credit agreement for the supply: –
  - (a) of goods within seven days after the date of the receipt of the goods; or
  - (b) of services within seven days after the date of the conclusion of the agreement.
- (2) The only charge that may be levied on the consumer is the direct cost of returning the goods.
- (3) If payment for the goods or services has been effected prior to a consumer exercising a right referred to in subsection 1, the consumer is entitled to a full refund of such payment, which shall be made within 30 days of the date of cancellation.
- (4) This section shall not be construed as prejudicing the rights of a consumer provided for in any other law.
- (5) This section shall not apply to electronic transactions:
  - (a) for financial services, including but not limited to investment services, insurance and reinsurance operations, banking services and operations relating to dealings in securities;
  - (b) by way of an auction;
  - (c) for the supply of foodstuffs, beverages or other goods intended for everyday consumption supplied to the home, residence or workplace of the consumer;
  - (d) for services which began with the consumer's consent before the end of the seven-day period referred to in this section;
  - (e) where the price for the supply of goods or services is dependent on fluctuations in the financial markets and which cannot be controlled by the supplier;
  - (f) where the goods:
    - (i) are made to the consumer's specifications;
    - (ii) are clearly personalised;
    - (iii) by reason of their nature cannot be returned; or
    - (iv) are likely to deteriorate or expire rapidly;
  - (g) where audio or video recordings or computer software were unsealed by the consumer;
  - (h) for the sale of newspapers, periodicals, magazines and books;

- (i) for the provision of gaming and lottery services;
- (j) for online gambling;
- (k) for the provision of accommodation, transport, catering or leisure services and where the supplier undertakes, when the transaction is concluded, to provide these services on a specific date or within a specific period; and
- (l) such other exception/s as may be prescribed.

## **29      Applicability of foreign law**

The protection provided to consumers in this Part applies irrespective of the legal system applicable to the agreement in question.

## **30      Non-exclusion**

Any provision in an agreement which excludes any rights provided for in this Part is null and void.

## PART VI

### ON-LINE MARKETING

## **31      Unsolicited commercial communications**

- (1) Marketing by means of electronic communication shall provide the addressee with:
  - (a) the originator's identity and contact details including its place of business, e-mail, addresses and telefax number(s);
  - (b) a valid and operational opt-out facility from receiving similar communications in future; and
  - (c) the identifying particulars of the source from which the originator obtained the addressee's personal information.
- (2) Unsolicited commercial communications may only be sent to addressees where the opt-in requirement is met.
- (3) The opt-in requirement will be deemed to have been met where:
  - (a) the addressee's e-mail address and other personal information was collected by the originator of the message "in the course of a sale or negotiations for a sale";
  - (b) the originator only sends promotional messages relating to its "similar products and services" to the addressee;
  - (c) when the personal information and address was collected by the originator, the originator offered the addressee the opportunity to opt out (free of charge except for the cost of transmission) and the addressee declined to opt out; and
  - (d) the opportunity to opt out is provided by the originator to the addressee with every subsequent message.

- (4) No contract is formed where an addressee does not respond to an unsolicited commercial communication.
- (5) An originator who fails to provide the recipient with an operational opt-out facility referred to in subsections 1(b) and 3(d) is guilty of an offence and liable, on conviction, to the penalties prescribed in subsection 8.
- (6) Any originator who persists in sending unsolicited commercial communications to an addressee, who has opted out from receiving any further electronic communications from the originator through the originator's opt-out facility, is guilty of an offence and liable, on conviction, to the penalties prescribed in subsection 8.
- (7) Any party whose goods or services are advertised in contravention of this section is guilty of an offence and liable, on conviction, to the penalties prescribed in subsection 8.
- (8) A person convicted of an offence referred to in this section is liable on conviction to a fine or imprisonment for a period not exceeding five years.

**PART VII**  
**SERVICE PROVIDERS**

**32 Mere conduit**

(1) A service provider shall not be subject to any civil liability in respect of third-party material in the form of electronic communications to which he merely provides access to or for operating facilities for information system services for the transmitting, routing or storage of electronic communications via an information system under its control, as long as the service provider:

- a. does not initiate the transmission;
- b. does not select the addressee;
- c. performs the functions in an automatic, technical manner without selection of the data; and
- d. does not modify the data contained in the transmission.

(2) The acts of transmitting, routing and providing access referred to in subsection 1 include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place:

- a. for the sole purpose of carrying out the transmission in the information system;
- b. in a manner that makes it ordinarily inaccessible to anyone other than anticipated recipients; and
- c. for a period no longer than is reasonably necessary for the transmission.

**33 Caching**

A service provider shall not be subject to any civil liability in respect of third-party material in the form of electronic communications for the automatic, intermediate and temporary storage of that data, where the purpose of storing such data is to make the onward transmission of the data more efficient to other recipients of the service upon their request, as long as the service provider:

- a. does not modify the data;
- b. complies with conditions on access to the data;
- c. complies with rules regarding the updating of the data, specified in a manner widely recognized and used by industry;
- d. does not interfere with the lawful use of rights management information, widely recognized and used by industry, to obtain information on the use of the data; and
- e. removes or disables access to the data it has stored upon receiving a take-down notice referred to in section 35.

**34 Hosting**

(1) A service provider shall not be subject to civil liability in respect of third-party material in the form of electronic communications where the service provider provides a service at the request of the recipient of the service that consists of the storage of data provided by a recipient of the service, as long as the service provider:

- (a) does not have actual knowledge that the electronic communication or an activity relating to the electronic communication is infringing the rights of a third party; or

- (b) is not aware of facts or circumstances from which the infringing activity or the infringing nature of the electronic communication is apparent; and
  - (c) upon receipt of a take-down notification from the aggrieved party referred to in section 30, acts expeditiously to remove or to disable access to the data.
- (2) The limitations on liability established by this section do not apply to a service provider unless it has designated an agent to receive notifications of infringement and has provided through its service, including on its websites in locations accessible to the public, the contact details of the agent.
- (3) Subsection 1 does not apply when the recipient of the service is acting under the authority or the control of the service provider.

### **35 Information location tools**

A service provider shall not be subject to civil liability in respect of third-party material in the form of electronic communications if the service provider refers or links users to a web page containing an infringing electronic communication or an infringing activity, by using information location tools, including a directory, index, reference, pointer or hyperlink, where the service provider:

- (a) does not have actual knowledge that the electronic communication or an activity relating to the electronic communication is infringing the rights of that person;
- (b) is not aware of facts or circumstances which evidences the infringing activity or the infringing nature of the electronic communication;
- (c) does not receive a financial benefit directly attributable to the infringing activity; and
- (d) removes or disables access to the reference link to the electronic communication or activity within a reasonable time after being informed that the electronic communication or the activity relating to such electronic communication infringes the rights of a person.

### **36 Take-down notification**

(1) For the purposes of this Part , a notification of unlawful activity shall be in the form of an electronic communication and it shall be addressed to the service provider or its designated agent.

(2) The notification shall include:

- (a) the full names and address of the complainant;
- (b) the signature of the complainant;
- (c) identification of the right that has allegedly been infringed;
- (d) identification of the material or activity that is claimed to be the subject of unlawful activity;
- (e) the remedial action required to be taken by the service provider in respect of the complaint;
- (f) telephonic and electronic contact details, if any, of the complainant;
- (g) a statement that the complainant is acting in good faith;
- (h) a statement by the complainant that the information in the take-down notification is to his or her knowledge true or correct.

(3) Any person who lodges a notification of unlawful activity with a service provider knowing that it materially misrepresents the facts may be held liable for damages for wrongful take-down.

(4) A service provider is not liable for wrongful take-down in a bona fide response to a notification of unlawful activity which complies with subsection 1.

### **37 No general obligation to monitor**

(1) When providing the services contemplated in this Part there is no general obligation on a service provider to:

- (a) monitor the data which it transmits or stores; or
- (b) actively seek facts or circumstances indicating an unlawful activity.

(2) The Minister may, subject to the provisions of any other law, prescribe procedures for service providers to:

- (a) inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service; and
- (b) to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service.

### **38 Savings**

(1) Sections 32-35 do not affect:

- a. any obligation founded on an agreement;
- b. the obligation of a service provider acting as such under a licensing or other regulatory regime established by or under any law;
- c. any obligation imposed by law or by a court to remove, block or deny access to any electronic communication or to terminate or prevent unlawful activity in terms of any other law;
- d. any additional right to limitation of liability based on the common law or the Constitution.

(2) This Part does not affect the civil liability in terms of the common law or a statute.