



BRIEF

EndCode / E-Commerce Forum South Africa

FOR: ALASTAIR TEMPEST



ECTA AMENDMENTS: AN E-COMMERCE LENS

INTRODUCTION

Having been operational since August 2020, the Electronic Communications and Transactions Act 2002 (ECTA) primarily aims to regulate rights and obligations on the digital handling of information. There are several objects listed in Section 2 of the Act, which are relevant to this opinion piece, namely:

- to enable e-commerce;
- to codify role of the information-economy and its economic and social impact;
- to remove and prevent barriers to electronic communications;
- to ensure that electronic transactions in the Republic conform to the highest international standards; and
- to promote the development of electronic transactions services which are responsive to the needs of users and consumers;

In pursuit of the above goals, ECTA has achieved numerous accomplishments. Of particular note, the Act has assisted in: extending legal enforceability to electronic writings; establishing the LAWtrust – South Africa's first electronic authentication service provider; establishing the .za Domain Name Authority (zaDNA); and effectively affording the right to consumer protection between 2002 to 2011 (before the Consumer Protection Act came into effect).

However, the Act has been in operation for nearly two decades and technology has significantly transformed the world's economy as group and personalised profiling capabilities have exponentially grown. In today's age, whether intentionally or unintentionally, South Africans leave a cosmic expanse of processable electronic traces (bits of information). The correlation and compilation of these electronic traces is what then spawns infinite profiles that in effect: facilitate a real-time breakdown of behaviours, responsiveness, inclinations, individuality; and affirm any predictions thereof. The ability to obtain instantaneous data flows worldwide, and the digitisation of information has enabled new business models and transformed the composition of trade.

With the above in mind, the calls for amendments to ECTA seek to reflect technological advances since 2002 and align South Africa to the international standards and agreements affecting electronic transactions and communications.

REGULATORY ANALYSIS OF ELECTRONIC COMMUNICATIONS AND TRANSACTIONS BILL

Summarising the Electronic Communications and Transactions Bill

The Electronic Communications and Transactions Bill 2012 (the Bill) essentially amends several Chapters in ECTA. This opinion piece will summarise the 5 (five) that significantly impact e-commerce in South Africa. In effect, the structure of the summary will cover what the Amendments provide with regards to: proposed interpretation of ECTA (Chapter 1); Maximising Benefit and Policy Framework (Chapter 2); facilitating electronic transactions (Chapter 3); cryptography providers (Chapter 5); authentication service providers (Chapter 6); consumer protection (Chapter 7).

Amended Definitions

The Bill proposes amendments to a number of definitions, including for an electronic transaction, commercial communication, electronic signature, and unsolicited communication, to name a few.



The definition of electronic transaction and electronic communications have been amended to include unsolicited and solicited communications.

Section 45 of the ECTA provides that recipients of unsolicited communications are able to opt-out of future communications and may request information on where their contact details were obtained. The Bill in contrast prohibits unsolicited communications unless the data subject has opted in. Although Section 45 is the South African point of departure when it comes to unsolicited marketing, the section has now been repealed and replaced by section 69 of the POPIA.

Some of the definitions contained in the Act are amended as follows:

- Internet means *"data communicated through a worldwide network made up of electronic communications facilities using packet switching technology and communicating through TCP/IP or other Identified protocols and includes future versions thereof"*.
- Electronic Signature means a *"sound, symbol or process that is (i) uniquely linked to the signatory; (ii) capable of identifying the signatory; (iii) created using means that the signatory can maintain and which are under his control; (iv) linked to the data to which it relates in such a manner that any subsequent change of the data can be detected; and [means data attached to, incorporated in, or logically associated with other data and] intended by the user to serve as a signature."*

These definitions are amended to reflect the significant changes in electronic transactions and forms of communications. The new definitions, through clarifying the scope of certain terms (e.g. the internet), are also aimed at easing dispute resolutions on the digital space.

Cross Referenced Definitions

In this regard, the Bill proposes that some terms be referred to definitions existing in other legislation. The Bill proposes that the Act cross reference the Consumer Protection Act, 2008 (Act 68 of 2008) when interpreting the meaning of a "consumer"; "unsolicited communications"; and the term "consideration" that it inserts in the definition of "commercial electronic transaction".

In effect, a "consumer", with reference to ECTA, will now mean any person to whom goods or services are marketed or supplied to in the ordinary course of business. The meaning of "unsolicited communication" has been amended to align with Section 21 of the CPA, which defines it in terms of approaching recipients with electronic communications unsolicited communications (by means of a telephone, fax, sms, wireless computer access, email, or other form of technology data message) without specific and prior consent.

Importantly, although the CPA also regulates it, POPIA now governs direct marketing (both solicited and unsolicited) by electronic communications, as well as the processing of personal information for any direct marketing activities. It is also noteworthy that while the Bill does not expressly make mention of POPIA, it does suggest a definition of "personal information" that mirrors that which is afforded in POPIA.

Maximising Benefit and Policy Framework (Chapter 2 of ECTA)

This section is not meaningfully changed by the amendments. For example, the Bill proposes to amend Section 5 of ECTA by adding that the development of a national e-strategy must be done within two years after the enactment *"of this Electronic Communications and Transactions Amendment Act, 2012,"* in mere substitution of, *"of this Act"*.

Instead, it can be said that the amendments to this Chapter exist primarily to reinforce the need for a national e-strategy. As alluded to under the Bill's [Explanatory Memorandum](#), the inaction by the Department of Communications in fulfilling some of its obligations under the Act was the main reason that the SA Law Reform Commission initiated a call for ECTA to be amended. The national plan was set to address policy necessary in relation to e-readiness, SMME development, human



resource development, education, and training in the ICT sector. At the time of drafting the amending Bill, 9 (nine) years, instead of the prescribed 2 (two) years, had passed without the national plan being developed.

Nonetheless, it is important to note that a [National e-Strategy Digital Society South Africa](#) was eventually published in the Government Gazette in November of 2017.

Facilitating Electronic Transactions (Chapter 3 of ECTA)

The ECTA is championed as the first legislation in South Africa to formally recognise electronic writing as legally enforceable. In this regard, the Act's provisions were primarily modelled on the United Nations Commission on International Trade Law (UNCITRAL) standards at the time. UNCITRAL introduced a Model Law on Electronic Commerce (MLEC) which is a set of internationally acceptable rules aimed at removing legal obstacles and increasing legal certainty for electronic commerce to foster international trade.

The Bill seeks to further remove legal barriers to electronic transacting by expressly amending Section 15 of ECTA to afford electronic signatures evidentiary weight. This too can be said to be done with the intention to further align the South African e-commerce position to the MLEC. The MLEC was the first legislative text to adopt, amongst others, the fundamental principles of:

- non-discrimination - the principle ensures that a document would not be denied legal effect, validity, or enforceability solely on the grounds that it is in electronic form;
- functional equivalence - the principle lays out criteria under which electronic communications may be considered equivalent to paper-based communications. In particular, it sets out the specific requirements that electronic communications need to meet in order to fulfil the same purposes and functions that certain notions in the traditional paper-based system - for example, "writing," "original," "signed," and "record"- seek to achieve; and
- for the attribution of data messages,
- for the acknowledgement of receipt and for determining the time and place of dispatch and receipt of data messages.

As such, the Bill envisions Part 1 of the ECTA Chapter on Electronic Transactions covering the first two principles, and Part 2 of it covering the last two principles.

Cryptography Providers (Chapter 5 of ECTA)

Chapter 5 has been amended to provide specific objectives for cryptography providers; their services, products and their obligation to renew their registration every 2 years. Other important objectives of Chapter 5 to update the legislation in line with international trends in cryptography to:

- provide for responses to requests for mandatory and lawful access to encrypted data.
- to address challenges associated with international cryptography products when it is necessary to gather security-related information OF national importance.
- enable cooperation with the justice and policing sectors on building capacity in relation to the above.
- The register will now indicate the country of origin of cryptography products.

Authentication Service Providers (Chapter 6 of ECTA)

One of the core distinctions under the ECTA is that it enabled the creation of LaWtrust – South Africa's first electronic authentication service provider, followed by the South African Post Office in 2013. The Bill adds an additional requirement to Section 33, 35 – 41, of registration of service providers; goods and services; and the renewal of registration.



Furthermore, the Bill amends the Act to require that there be all electronic signatures accredited in a foreign jurisdiction will only be recognised in South Africa if that authority is an “*equivalent institution with responsibility for the accreditation and registration of certification service providers or authentication service.*” Essentially, there needs to exist an agreement of a shared recognition between the two jurisdictions.

According to the Bill’s [Explanatory Memorandum](#), these added requirements will ensure the creation of a registry that will assist in the effective tracking of manufacturers and service providers.

Consumer Protection (Chapter 7 of ECTA)

Several sections under this Chapter were repealed with the introduction of the Consumer Protection Act, 2008 with the exception of sections 43 and 44. Section 44 provides for a cooling off period for direct marketing transactions. This right means that a person may cancel an agreement entered with a supplier that resulted from the direct marketing, without a penalty fee. Section 43 of ECTA sets out the information that suppliers should send to the consumer otherwise the electronic communication may be deemed unsolicited. Essentially the list, from subsection 1(a) – (r), obligates full details with regards to the supplier’s business and characteristics of the goods and services it provides.

To this end, the ECTA penalises unsolicited communications under Section 89 (1) of ECTA’s criminal penalties. Section 89 (1) states that an offender can be found liable to a fine or imprisonment for a period not exceeding 12 months. However, the Act falls short of outlining limits of the fine punishable. The Bill’s proposed amendment seeks to clarify this by suggesting that the fine not exceed R1 million.

RECOMMENDATIONS FOR ECTA AMENDMENTS

The ECTA has pioneered South African legislation into a digitally conscious direction. The Act has been the subject of very few cases on its interpretation, implying good stylistic writing (S Eiselen, 2014). Still, the substance of what the Act canvases similarly needs to be notable. The relevance of the Act is still of concern given that it is based on the MLEC – a 1996 standard and understanding of technology. The model law provides a basic text and guidance to South African legislators when legislating. However, the pace at which technology expands requires continuous law reform. The ECTA must therefore be amended to align with new international standards and emerging technologies.

How does the ECTA Align with International Standards?

The [2019 EU E-Commerce Rules](#) provide a model for how to embrace digitalisation. The Rules address the following:

- New regulations to combat unjustified geo-blocking which prevents EU residents from buying from vendors in other EU states. Since 31 December 2018, online vendors must treat EU customers equally, regardless of location. Consumers may not be redirected to country specific websites or be required to use country-specific cards for payment.
- There are new regulations for cross-border deliveries of items purchased online. The objective is to protect consumers by mandating price transparency and encouraging competition. While there is not a cap on pricing, the transparency requirement allows consumers to compare prices easily on a dedicated EU website.
- The Rules enhance consumer protection as they facilitate the removal of social media accounts and websites linked to fraud. It is now also possible to compel banks and internet service providers to disclose information required for identifying non-compliant online vendors.



- The European Commission is currently discussing new regulations on electronic contracts to better protect consumers.
- In 2018, the EU proposed the New Deal for Consumers which would require online vendors to disclose whether a consumer is transacting with a private individual or a company. Consumers will also be clearly informed where online vendors have paid for search results and online platforms must explain how search rankings are determined.
- EU consumers are entitled to enjoy access to their online subscriptions to audiovisual content wherever they travel within the EU. The Commission is also working on copyright amendments to facilitate the greater cross-border access to online content.
- Finally, the Commission has committed to upgrading safety and liability regulations for digital platforms and services by promulgating a new Digital Services Act Package.

The ECTA amendments should pay attention to the themes in the Rules above, especially in regard to enhanced consumer protection. Consumer protection measures are an outstanding element in the EU framework and should also be prioritised in the South African regulatory framework. The amendments must be drafted with a view to relevant provisions of the Cybercrimes Bill which is also relevant in regard to unscrupulous online vendors.

Information Society Service Provisions

An expansion on the definition of information society service can include so-called digital enterprises which are not traditional ecommerce enterprises. The following definitions should be considered:

- The [EU's Electronic Commerce Directive 2000](#) defines information society service as any service which is remunerated and conducted at a distance using electronic devices to store and process data on the request of recipients of that service.
- The UK Department for Business, Innovation and Skills stated in 2009 that the definition of an information society includes services which are not directly remunerated by the recipients for example, online information services, digital advertising and tools used for searching, accessing and retrieving data.
- In *Google France SARL, Google Inc v Louis Vuitton Malletier SA and others* (2010), at issue was whether Google Search is classified as an information society service and the court held that an internet referencing service is also an information society service based on the storage of information provided by the advertiser.

Reimagining Digital Content

The EU is currently in the process of harmonising the supply of [digital content](#) and the on [online sales of goods and service](#) through respective Draft Directives, which have subsequently resulted in the Internal Market and Consumer Protection Committee (IMCO) and Legal Affairs (JURI)'s [joint report](#). Inspired by international developments, South Africa can [include](#) the following in an amended ECTA:

- Definitional elements – to include non-monetary exchanges as e-commerce transactions such as *gaining access to specific digital material* including digital content embedded in tangible goods.
- Time limits – the report proposes a 2-year prescription period for defect liability, warranties, and a supplier's burden of proof (which falls on the consumer after the period).

Inserting Blockchain Provisions

Wyoming (USA) is regarded as having a model legal framework for blockchain technologies. [Forbes](#) calls out in particular the recognition of digital assets in their various forms as direct property rights



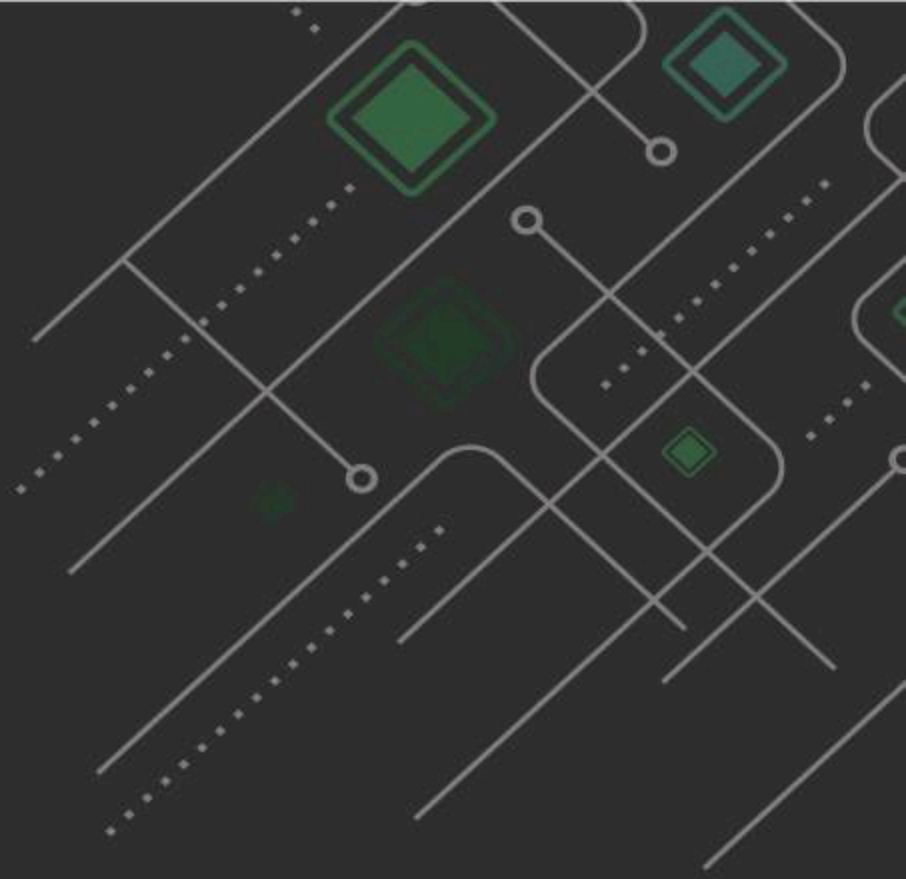
as an option for e-commerce legal reform - applying the negotiability rules of commercial law to virtual currencies which foster their liquidity by applying the very same rules that apply to money.

The global economy is slowly becoming more reliant on new technologies such as blockchain; and its smart contract by-product. Therefore, in order for ECTA to persevere with the original intention of establishing legal certainty and validity for digital transactions, an amended ECTA needs to consider a framework that enables blockchain technology and cryptocurrencies. Crucially, ECTA may include liability provisions and provisions on the enforceability of these technologies or recognise existing commercial laws as a bridge to their enforcement in digital transactions further advancing legal certainty.

CONCLUSION

As the ECTA was passed 18 years ago, amendment affords a valuable opportunity to consider emerging technologies and the exponential growth of the digital economy. The South African government has identified the acceleration of the digital economy as a national priority and a strong regulatory framework is essential. Therefore, the legislature consider amendments in alignment with international best practices and pay attention to legislative developments in other regions while providing a competent regulatory framework which keeps pace as new forms of digital commerce.






ENDCODE
Tech. Law. Policy. Africa.



Silky Oak House | Bally Oaks Office Park | 35 Ballyclare Drive | Bryanston
Johannesburg, South Africa

 +27 (0) 11 463 4594

 endcode.org

 base@endcode.org

 [@endcode_org](https://twitter.com/endcode_org)

Company Reg No. 2014/118528/07

