

THE ELECTRONIC COMMUNICATIONS AND TRANSACTIONS

BILL, 2020

(Bill No ... of 2020)

(To be presented by the Minister for Information Communications and Technology)

MEMORANDUM OF OBJECTS AND REASONS

The object of the Act is to provide for-

- (a) the regulation of electronic transactions and electronic communications;
- (b) the facilitation of the use of e-government services;
- (c) the protection of consumers;
- (d) the limitation of the liability of service providers; and
- (e) incidental matters.

S.M.M KHUMALO
ATTORNEY-GENERAL

A BILL

Entitled

AN ACT to regulate electronic transactions, electronic communications and the use of e-government services and to provide for incidental matters.

ENACTED by the King and Parliament of Eswatini.

ARRANGEMENT OF SECTIONS

PART I

PRELIMINARY PROVISIONS

Sections

1. Short title and Commencement
2. Interpretation
3. Application
4. Variation by agreement

PART II

LEGAL EFFECT OF ELECTRONIC COMMUNICATION

5. Legal recognition of electronic communications
6. Writing
7. Electronic signature

PART III

ELECTRONIC TRANSACTIONS

8. Formation and validity of contracts
9. Variation by agreement
10. Time of dispatch of electronic communications
11. Time of receipt of electronic communications
12. Place of dispatch and receipt of electronic communications
13. Time of contract formation
14. Automated transactions
15. Input errors

PART IV

ELECTRONIC COMMERCE

16. Attribution
17. Original information
18. Retention of records
19. Production of document or information
20. Notarisation, acknowledgement and certification
21. Other requirements

PART V

CRYPTOGRAPHY PROVIDERS

22. Register of cryptography providers
23. Registration compulsory
24. Restrictions on disclosure of information

PART VI

E-GOVERNMENT SERVICES

25. Acceptance of electronic filing and issuing of documents
26. Requirements may be specified
27. Use of information technology

PART VII

CONSUMER PROTECTION

28. Consumer protection scope of application
29. Obligations of suppliers
30. Performance
31. Cooling off period
32. Application of foreign law
33. Non-exclusion
34. Unsolicited electronic mail
35. Complaints

PART VIII

LIMITATION OF LIABILITY OF SERVICE PROVIDERS

36. Mere conduit
37. Caching
38. Hosting
39. Information location services
40. Take-down notification
41. No general obligation to monitor
42. Recognition of representative body
43. Conditions for eligibility
44. Savings

PART X

GENERAL PROVISIONS

45. Offence by body corporate
46. Limitation of liability
47. Regulations

PART I

PRELIMINARY PROVISIONS

Short title and Commencement

1. (1) This Act may be cited as the Electronic Communications and Transactions Act, 2020.
- (2) This Act shall come into force on a date as the Minister may by notice published in the Gazette, determine.

Interpretation

2. In this Act, unless the context otherwise requires-

"addressee" in respect of an electronic communication, means a party who is intended by the originator to receive electronic communication, but does not include the 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 or 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 in an information system in order to speed up data transmission or processing;

“Commission” means means the Eswatini Communications Commission, established under the Eswatini Communications Commission Act, 2013;

“consumer” means any person who enters or intends to enter into an electronic transaction with a supplier for the goods or services offered by that supplier for own use or consumption;

“cryptography provider” means any person who provides or who proposes to provide cryptography services or cryptography products or systems;

“cryptography service” means any service which is provided to a sender or a recipient of an electronic communication, or to anyone storing an electronic communication which is designed to facilitate the use of cryptographic techniques for the purpose of ensuring-

- (a) that such data or electronic communication can be accessed or can be put into an intelligible form only by certain persons;
- (b) that the authenticity or integrity of such data or electronic communication is capable of being ascertained;
- (c) the exclusion of the supply of, or of any right to use computer software or computer hardware except where the supply is integral to the provision of cryptography services not consisting in such supply.

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

“Director” means the Director responsible for Communications;

“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 communications service” shall have the same meaning as in the Electronic Communications Act, 2013;

"end-user" means a person who has contracted for, or who requests a communications service

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

“electronic signature” means data, including an electronic sound, symbol or process executed or adopted to identify a party and to indicate the approval or intention of that party 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 a non-commercial nature, and includes the provision of information or e-government services;

“information” includes data, text, images, sound, codes, computer programs, software and databases;

“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 choosing of the user, without modification to the content of the data sent, stored or received;

“intermediary” means a person who, on behalf of another person, whether as agent or not, sends, receives or stores that electronic communication or provides other services with respect to that electronic communication;

“internet” means the interconnected system of networks that connects computers around the world using the TCP/IP and includes future versions arising from it;

“law” includes any instruments having the force of law and any unwritten rule of law;

“Minister” means Minister responsible for communications;

“originator” 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;

“prescribe” means prescribe by regulation under this Act;

“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;

“public body” means department or ministry of the Government, organ of State, public enterprise or service commission;

“relevant authorities” means authorities provided for and specified in this Act or any other person or a body as the Minister may appoint by notification in *Gazette* in relation to administration and enforcement of any matter governed by this Act and a “relevant authority” is any one of them;

“relevant subjects” means persons or entities regulated by relevant authorities;

“relevant parts of this Act” refers to Parts of this Act administered and enforced by relevant authorities;

“secure electronic signature” means a signature duly recognised in terms of section 7, 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;

“signed” or “signature” and its grammatical variations include any symbol executed or adopted, or any methodology or procedure employed or adopted, by a person with the intention of authenticating a record, including electronic or digital methods.

Application

3. (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 (3).

(2) This Act does not limit the operation of any law that expressly authorises 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.

(3) The provisions of Parts II and III shall not apply to any law requiring writing or signatures in-

- (a) the creation or execution of a will;
- (b) negotiable instruments;

(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) any contract for the sale or other disposition of immovable property, or any interest in such property;

(e) the conveyance of immovable property or the transfer of any interest in immovable property; or

(f) documents of title.

(4) Nothing in this Act shall be construed as requiring any person to use or to accept electronic communications or prohibiting a person engaging in an electronic transaction or electronic commerce from establishing reasonable requirements about the manner in which it will accept electronic communications.

(5) Notwithstanding the provisions of subsection (3), an agreement by a person to use or accept electronic communications may be inferred from the conduct of that person.

(6) Part VI of this Act shall not apply to the national intelligence agencies and such institutions as the Minister may exempt by notice published in the gazette.

Variation by agreement

4. (1) The provisions of sections 5 and 6 may be varied by agreement between the parties involved in the creating, generating, sending, receiving, storage or otherwise processing or using the electronic record.

(2) Subsection (1) does not affect any right that may exist to modify by agreement any law referred to in Part II.

PART II

LEGAL EFFECT OF ELECTRONIC COMMUNICATION

Legal recognition of electronic communications

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

(2) A declaration, 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.

(3) A record or information shall not be denied legal effect, validity or enforceability on the ground that it is not contained in the data message that is giving rise to its legal effect, validity or enforceability but it is referred to in such data message.

(4) Information incorporated in a record or agreement shall be regarded as having been incorporated into a data message if such information is-

(a) referred to in a way in which any person would have noticed the reference to it and incorporation of it; or

(b) accessible in a form in which it may be read, stored, and retrieved by the other party whether electronically or as a computer printout as long as such information is reasonably capable of being reduced into electronic form by the party incorporating it.

Writing

6. (1) Where a law requires any information or record to be in writing or provides for certain consequences if it is not, an electronic communication satisfies that law if the information or record is accessible so as to be usable for subsequent reference.

(2) Subsection (1) applies whether the requirement 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 includes-

(a) making an application;

(b) making, filing or lodging a claim;

(c) giving, sending or serving a notification;

(d) filing or lodging a return;

(e) making a request;

(f) making a declaration or demand;

(g) filing, lodging or issuing a certificate;

(h) making, varying or cancelling an election;

(i) filing or lodging an objection;

(j) giving a statement of reasons; and

(k) any other such document or instrument as may be prescribed by Regulation.

Electronic signature

7. (1) Where a law requires the signature of a person, that requirement shall be fulfilled by an electronic signature as prescribed by regulations under the Electronic Records (Secure Electronic Signature) Regulations, 2010 and this Act.

(2) The requirement for an electronic signature referred to in subsection (1) shall be met where-

(a) the method is used to identify the person and to indicate the intention of a person 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 agree to make use of electronic signatures, they may agree to use any method of signing as they consider appropriate.

(4) Subsection (1) applies whether the requirement referred to in subsection (1) is in the form of an obligation or whether the law provides consequences for the absence of a signature.

(5) An electronic signature that is not a secure electronic signature is not subject to the presumptions set out in section 5.

PART III

ELECTRONIC TRANSACTIONS

Formation and validity of contracts

8. (1) Where an electronic communication is 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 a proposal that makes use of interactive applications for the placement of orders through such information systems, is to be considered as an invitation to make an offer, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance.

Variation by agreement

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

Time of dispatch of electronic communications

10. (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 an electronic communication occurs when it is capable of being retrieved by the addressee.

Time of receipt of electronic communications

11. (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-

- (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 section 10(2) when it reaches the electronic address of the addressee.

(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.

Place of dispatch and receipt of electronic communications

12. (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)-

- (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) if 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 place of residence; and

(c) the "usual place of residence", in relation to a body corporate, means the place where it is incorporated or otherwise legally constituted.

(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.

Time of contract formation

13. (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 that it is received by the offeror.

Automated transactions

14. A contract formed by the interaction of an automated message system and a natural 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.

Input errors

15. (1) Where a natural person makes an input error 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, that person made an error in the electronic communication;
- (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; or
- (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 thirty days of the date of cancellation.

(2) Nothing in this section affects the application of any 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 (1).

PART IV

ELECTRONIC COMMERCE

Attribution

16. (1) An electronic communication is that of the originator if it was sent by-
- (a) the originator personally;
 - (b) by a person who had the authority to act on behalf of the originator in respect of that electronic communication; or
 - (c) by an information system programmed by or on behalf of the originator to operate automatically.
- (2) A secure electronic signature shall be deemed to have been applied by the holder of the secure electronic signature, unless the contrary is proved.

Original information

17. (1) Where the law requires information to be presented or retained 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 referred in it is in the form of an obligation or whether the law 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.

Retention of records

18. (1) Where the law requires that certain documents, records or information be retained, that requirement is met by electronic record retention, providing that-

- (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) shall 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 the conditions set forth in subsection (1) paragraphs (a) to (c) are satisfied.

Production of document or information

19. (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.

Notarisation, acknowledgement and certification

20. (1) Where a law requires a signature, statement or document to be notarized, acknowledged, verified or made under oath, that requirement is met if the secure electronic signature of the person authorized 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.

Other requirements

21. (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

CRYPTOGRAPHY PROVIDERS

Register of cryptography providers

22. (1) The Minister shall establish and maintain a register of cryptography providers who are for the time being approved under arrangements in force under this section.

(2) The Minister shall record the following particulars in respect of a cryptography provider in that register-

- (a) the name and address of the cryptography provider;
- (b) description of the type of cryptography service or cryptography product being provided;
- (c) such particulars as may be prescribed to identify and locate the cryptography provider or its product or services adequately; and

(d) the conditions of the approval.

(3) A cryptography provider is not required to disclose confidential information or trade secrets in respect of its cryptography services or products.

Registration compulsory

23. (1) A person may not provide cryptography services or cryptography products until the particulars referred to in section 22 in respect of that person have been recorded in the register contemplated in section 22.

(2) A cryptography provider shall, in the prescribed manner furnish the Minister with the information required and pay the prescribed administrative fee.

(3) A cryptography service or cryptography product is regarded as being provided in Eswatini if it is provided-

- (a) from premises within Eswatini;
- (b) to a person who is resident in Eswatini when that person makes use of the service or product; or
- (c) to a person who uses the service or product for the purpose of a business carried on in Eswatini or from premises within Eswatini.

Restrictions on disclosure of information

24. (1) Information contained in the register provided for in section 22 shall not be disclosed to any person other than to employees of the Department who are responsible for the keeping of the register.

(2) Subsection 1 does not apply in respect of information which is disclosed-

- (a) to a relevant authority which investigates a criminal offence or for the purposes of any criminal proceedings;
- (b) to government agencies responsible for safety and security in the Kingdom pursuant to an official request;
- (c) to a cyber inspector; or
- (d) for the purpose of any civil proceedings which relate to the provision of cryptography services or cryptography products and to which a cryptography provider is a party.

PART VI

E-GOVERNMENT SERVICES

Acceptance of electronic filing and issuing of documents

25. Any public body that, pursuant to any law-
- (a) accepts the filing of documents, or requires that documents be created or retained;
 - (b) issues any permit, licence or approval; or
 - (c) provides for a manner of payment;
- may, notwithstanding anything to the contrary in such law-
- (i) accept the filing of such documents, or the creation or retention of such documents in the form of electronic communications;
 - (ii) issue such permit, licence or approval in the form of an electronic communication; or
 - (iii) make or receive payment in electronic form or by electronic means.

Requirements may be specified

26. (1) In any case where a public body performs any of the functions referred to in section 25, such body may specify by notice in the Gazette-
- (a) the manner and format in which the electronic communications shall be filed, created, retained or issued;
 - (b) in cases where the electronic communication has to be signed, the type of electronic signature required including, if applicable, a requirement that the sender use an electronic signature or secure electronic signature;
 - (c) the identity of or criteria that shall be met by the certifying authority appointed in accordance with the Electronic Records (Approved Process) Regulations, 2009 or under this Act used by the person filing the document;
 - (d) the appropriate control processes and procedures to ensure adequate integrity, security and confidentiality of electronic communications or payments; and
 - (e) any other requirements for electronic communications or payments.
- (2) Nothing in this Act shall compel any public body to issue any document in the form of electronic communications.

Use of information technology

27. (1) The Director shall exercise control over the use of all communications and information technology equipment and ICT services by any public body.

- (2) In exercising its power under this section, the Director may-
- (a) prescribe guidelines or rules regarding the use of any communications and information technology equipment or services by a public body;
 - (b) prescribe guidelines or rules regarding safety and security of communications and information technology equipment or services used by a public body;
 - (c) oversee any use of any communications and information technology equipment or services by a public body;
 - (d) direct any public body or any officer or employee to take such measures or stop carrying on such activities as are specified in the notice if they are necessary to ensure compliance with the provisions of this Act or any regulations made under the Act.

PART VII

CONSUMER PROTECTION

Consumer protection scope of application

28. (1) This Part applies to contracts concerning goods or services concluded between a supplier and a consumer by means of electronic communications.

- (2) Section 30 and 31 does not apply to contracts-
- (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 consent of the consumer before the end of the seven-day period referred to in section 30;

- (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 specifications of the consumer;
 - (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 downloaded or 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 on-line gambling; or
- (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.

Obligations of suppliers

29. (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 address and telefax number;
 - (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 fourteen 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.

Performance

30. (1) The supplier shall execute the order within thirty (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 thirty (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 thirty (30) days after the date of such notification.

Cooling-off period

31. (1) A consumer is entitled to cancel with reason and without penalty any transaction and any related credit agreement for the supply of-

- (a) goods within seven days after the date of the receipt of the goods; or
- (b) services within seven days after the date of the conclusion of the contract.

(2) The 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 refund must be made within thirty (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.

Application of foreign law

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

Non-exclusion

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

Unsolicited electronic communications

34. (1) Marketing by means of electronic communication shall provide the addressee with-

- (a) the identity of the originator and contact details including its place of business, e-mail, address and telefax number;
- (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 shall be considered to have been met where-

- (a) the email address and other personal information of the addressee was collected by the originator of the message in the course of a sale or negotiations for a sale;
- (b) the originator sends promotional messages relating to its similar products and services only 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; and
- (d) the opportunity to opt-out is provided by the originator to the addressee with every subsequent message.

(4) A contract shall not be 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) commits an offence and shall, on conviction be liable to the penalties prescribed in subsection (7).

(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, commits an offence and shall, on conviction be liable to the penalties prescribed in subsection(7).

(7) Any person who advertises goods or services in contravention of this section commits an offence and shall, on conviction be liable to a fine not exceeding one hundred thousand Emalangenani (E100, 000) or imprisonment for a period not exceeding two years or both.

Complaints

35. A consumer may lodge a complaint with the Eswatini Communications Commission which is mandated to administer this Act, in respect of any non-compliance with the provisions of this Part by a supplier.

PART VIII

LIMITATION OF LIABILITY OF SERVICE PROVIDERS

Mere conduit

36. (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 the service provider merely provides access to a telecommunications system for the transmission in a telecommunications system of information provided by a recipient of a telecommunications service, routing or storage of electronic communications via an information system under its control, as long as the service provider-

- (a) did not initiate the transmission;
- (b) does not select the addressee of the transmission;
- (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-

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

Caching

37. 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 information;
- (b) complies with conditions on access to the data;
- (c) complies with any rules regarding the updating of the data,, specified in a manner widely recognised and used by industry;
- (d) does not interfere with the lawful use of rights management information, widely recognised 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 notification referred to in section 40.

Hosting

38. (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;
- (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 40, 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.

Information location services

39. 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 of 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.

Take-down notification

40. (1) For the purposes of this chapter, 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; and
- (h) a statement by the complainant that the information in the take-down notification is, to the knowledge of the complainant, 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 takedown in a bona fide response to a notification of unlawful activity, which complies with subsection (2).

No general obligation to monitor

41. (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 provisions of any other law issue regulations prescribing 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) communicate to the competent authorities, at their request, information enabling the identification of recipients of their service.

Recognition of representative body

42. (1) The Minister may, on application by an industry representative body for service providers, by notice in the Gazette, recognize such body for purposes of this Act.

(2) The Minister may only recognize a representative body referred to in subsection (1) if the Minister is satisfied that-

- (a) its members are subject to a code of conduct;
- (b) membership is subject to adequate criteria;

- (c) the code of conduct requires continued adherence to adequate standards of conduct; and
- (d) the representative body is capable of monitoring and enforcing its code of conduct adequately.

Conditions for eligibility

43. The limitations on liability established by this Part apply to a service provider if-
- (a) the service provider is a member of representative body referred to in this Act; and
 - (b) the service provider has adopted and implemented the official code of conduct of that representative body.

Savings

44. (1) This Part shall 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 information; or
 - (d) any right to limitation of liability based on the common law or the Constitution.
- (2) This part does not affect civil liability in terms of the common law or a statute.

PART IX

GENERAL PROVISIONS

Offence by body corporate

45. (1) If an offence under this Act or any regulation made under this Act, has been committed by a company or a member of a partnership, firm or business, society or association of persons, every director or officer of that company or any other member of the partnership or association, or other person concerned with the management of the partnership, firm or business, society or association of persons, shall be liable for that offence unless that person proves to the satisfaction of the court that-

- (a) due diligence to secure compliance with the provisions of this Act was applied by that person, and
- (b) the offence was committed without the knowledge, consent or connivance of that person.

(2) A person, company, partnership, firm, business, society or association of persons convicted of an offence under this section shall be liable to a fine not exceeding one million Emalangeni (E1, 000, 000) or imprisonment of a period not exceeding five years or both.

Limitation of liability

46. The government, Minister or employee of the government shall not be liable in respect of any act or omission done in good faith and without gross negligence in performing a function under this Act.

Regulations

47. The Minister may make regulations to prescribe anything that requires to be prescribed under this Act and generally for the carrying out of the provisions of this Act.

Commented [tg1]: