

ADVISORY NOTE 10: E COMMERCE

This note is provided by the office of the Consumer Goods and Services Ombud (CGSO) to guide consumers and suppliers as to their obligations under the Consumer Protection Act (CPA).

Background

Certain sections or aspects of the CPA do not apply to e-commerce transactions if the Electronic Communications and Transactions (ECT) Act 25 of 2002 applies to them or if the CPA section specifically refers to the ECT Act. This note discusses the sections of CPA that do not apply to e-commerce. It must be noted however that section 3 of the ECT Act provides:

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, data messages or any other matter provided for in this Act.

Excluded sections

[Cooling-off period after direct marketing](#)

[Consumer's rights with respect to delivery of goods or supply of service](#)

[Disclosure of price of goods or services](#)

[Sales records](#)

[Catalogue marketing](#)

Cooling-off period after direct marketing

16. (1) This section does not apply to a transaction if section 44 of the Electronic Communications and Transactions Act [applies](#).

Summary section 16: A consumer may cancel a transaction resulting from any direct marketing without reason or penalty, by notice to the supplier in writing, or another recorded manner and form, within five business days after the agreement was concluded or delivery of the goods.

Section 44 of ECT

44. (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 refund must be made within 30 days of the date of cancellation.

(4) This section must not be construed as prejudicing the rights of a consumer provided for in any other law.

Applies

To establish if section 44 of ECT Act applies, one must refer to section 42:

42.(1) This Chapter applies only to electronic [transactions](#).

(2) Section 44 does not apply to an electronic transaction—

(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 section 44(1);

(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;

(supplier undertakes, when the transaction is concluded, to provide these services on a specific date or within a specific period.

(3) This Chapter does not apply to a regulatory authority established in terms of a law if that law prescribes consumer protection provisions in respect of electronic transactions.

"transaction" means a transaction of either a commercial or non-commercial nature, and includes the provision of information and e-government services;

Consumer's rights with respect to delivery of goods or supply of service

19. (1) This section does not apply to...

(b) a transaction if the performance of that transaction is governed by section 46 the Electronic Communications and Transactions Act.

Summary section 19: A supplier must deliver goods as agreed/ in a reasonable time, or the consumer can reject the goods.

Section 46 of ECT:

46.(1) The supplier must 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 must immediately notify the consumer of this fact and refund any payments within 30 days after the date of such notification.

Disclosure of price of goods or services

23. (1) This section does not apply to a transaction if...

(b) section 43 of the Electronic Communications and Transactions Act (reprinted below) applies to that transaction.

Summary section 23 : A retailer must not display any goods for sale without

displaying a price in relation to those goods; a supplier must not require a consumer to pay a price for any goods or services higher than the displayed price for those goods or services.

46.

(1) The supplier must 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 must immediately notify the consumer of this fact and refund any payments within 30 days after the date of such notification.

Section 43 of ECT:

43. (1) A supplier offering goods or services for sale, for hire or for exchange by way of an electronic transaction must make the following information available to consumers on the web site where such goods or services are offered:

(a) Its full name and legal status;

(b) its physical address and telephone number;

(c) its web site address and e-mail address;

(d) membership of any self-regulatory or accreditation bodies to which that supplier belongs or subscribes and the contact details of that body;

(e) any code of conduct to which that supplier subscribes and how that code of conduct may be accessed electronically by the consumer;

(f) in the case of a legal person, its registration number, the names of its office bearers and its place of registration;

(g) the physical address where that supplier will receive legal service of documents;

(h) 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;

(i) the full price of the goods or services, including transport costs, taxes and any other fees or costs;

(j) the manner of payment;

(k) any terms of agreement, including any guarantees, that will apply to the transaction and how those terms may be accessed, stored and reproduced electronically by consumers;

(l) the time within which the goods will be dispatched or delivered or within which the services will be rendered;

(m) the manner and period within which consumers can access and maintain a full record of the transaction;

(n) the return, exchange and refund policy of that supplier;

(o) any alternative dispute resolution code to which that supplier subscribes and how the wording of that code may be accessed electronically by the consumer;

(p) the security procedures and privacy policy of that supplier in respect of payment, payment information and personal information;

(q) where appropriate, the minimum duration of the agreement in the case of agreements for the supply of products or services to be performed on an ongoing basis or recurrently; and

(r) the rights of consumers in terms of section 44, where applicable.

(2) The supplier must provide a 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 subsection (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 must return the performance of the supplier or, where applicable, cease using the services performed; and

(b) the supplier must refund all payments made by the consumer minus the direct cost of returning the goods.

(5) The supplier must utilise a payment system that is sufficiently secure with reference to accepted technological standards at the time of the transaction and the type of transaction concerned.

(6) The supplier is liable for any damage suffered by a consumer due to a failure by the supplier to comply with subsection (5).

Is the advertised price binding?

Section 3 of ECT Act appears to say that the common law also applies to electronic transactions:

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, data messages or any other matter provided for in this Act.

In terms of the common law, a contract normally comes into effect where there is an offer that is accepted: *Estate Breet v Peri-Urban Areas Health Board* 1955 3 SA 523 (A). An offer occurs when someone puts forward a proposal with the intention that if it is accepted, a contract will come into existence.

In the case of *Crawley v Rex* 1909 TS 1105, a shopkeeper advertised on a placard outside his shop a particular brand of tobacco at a cheap price to attract the public. The court held that the advertisement did not constitute a binding offer that a customer could accept but was merely an announcement of the shopkeeper's intention to sell at the advertised price (this is known as an invitation to treat (do business)). The court was swayed by a concern that if a shopkeeper had sold out of the goods, thousands of customers may nevertheless hold him to the offer.

Some South African writers suggest that the same rules apply to ecommerce transactions, namely that the website owner is merely inviting offers from members of the public and it is the customer who makes the offer. According to Van der Merwe and Janse van Vuuren:

“The contract will be concluded when such [internet] order is received and accepted. The acceptance of the order will often be manifested merely by the dispatch of the goods to the purchaser. No legal relationship exists between the parties before the acceptance, and an offer may be revoked at any time before then.”¹

On this analysis, if a website owner made a mistake regarding price, it would not be binding- the website owner needs only to refuse the offer.

There is also the view that clicking on the “I accept” button on a website may amount to acceptance, depending whether the seller can accept or reject the transaction.²

The more widely held view is that by clicking on the “I accept” button, the transaction becomes binding. In the case of *Moore v. Microsoft Corp.* 293 A.D.2d 587 (2002) 741

¹ Marco van der Merwe & Francois Janse van Vuuren “Internet contracts” on <http://www.greyvensteins.co.za/internet-contracts/>. See also Murdoch Watney “Internet Law - Online Shopping: An Overview of the Legal Pitfalls Facing Business to Consumer E-commerce Within the context of South Africa Law” on http://www.ibls.com/internet_law_news_portal_view.aspx?s=latestnews&id=2232.

² Australian Campus Network “Management & legal implications of ecommerce” on www.harley.net.au/eCommerce/Week_7_Lecture_eCommerce.ppt.

N.Y.S.2d 91,³ the New York Appellate Court ruled that by clicking the “I agree” icon after having been given the opportunity to read and reject Microsoft’s contract at leisure,⁴ the plaintiff [consumer] clearly manifested assent to Microsoft’s agreement. According to Matsuura, “[u]se of an on-screen notice and electronic contract that specify the important terms of the transaction provide a valid contract offer. Acceptance can be validly provided through the use of electronic signatures or an “I accept” icon.”⁵

In South Africa, the Labour Court held in the case of *Jafta v Ezemvelo KZN Wildlife* (D204/07) [2008] ZALC 84 at para 59 that it had a duty to ascertain the international and foreign law applicable to the internet and other electronic communication systems in order to determine whether the international instruments are binding on South Africa, what the best practice is and consequently how the court should interpret and apply provisions of ECT Act [Electronic Communications and Transactions Act 25 of 2002].

Article 14(2) of UNCITRAL Model Law⁶ provides that “[a] proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal”. This is in line with the dicta of *Crawley v Rex* (supra). The Model law does not however link this to an ecommerce environment. This may not be applicable in South Africa as one has to have reference to the wording of the ECT Act. In the opinion of Snail, despite the fact that no common law exists confirming the validity and enforceability of click-wrap agreements, section 22 (1) of the ECT Act makes enforceable an agreement that was concluded partly or in whole by means of data messages.⁷

It needs to be added that this is in effect the default position as section 21 specifies that Part 2 of ECT Act only applies if the parties have not reached agreement on the issue, i.e. the terms of the agreement do not say otherwise.

Where the terms of the agreement do not provide otherwise, there are two provisions of the ECT Act that point to the default position being that the offer made by the supplier is a binding offer open to acceptance by the consumer:

Section 20(e)

³ On

http://www.leagle.com/decision/2002880293AD2d587_1437.xml/MOORE%20v.%20MICROSOFT%20CORPORATION.

⁴ These are referred to as click-through, web-wrap or click-wrap agreements.

⁵ Jeffrey H. Matsuura *Security, Rights, and Liabilities in E-Commerce* at 185. See also Abdulhadi M. Alghamdi *The Law of E-Commerce: E-Contracts, E-Business* at 86 and Donald M. Crawford and Stephen L. Tupper “Making Electronic Signatures Stick” *Michigan Bar Journal* March 2003 24 at 26 on <https://www.michbar.org/journal/pdf/pdf4article548.pdf>

⁶ General Assembly of the United Nations Commission on International Trade Law regarding the Model Law on Electronic Commerce

⁷ Sizwe Snail “Electronic Contracts in South Africa - A Comparative Analysis” 1 *JILT* 2008 (2) on http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2008_2/snail/

[N]o agreement is formed where a natural person interacts directly with the electronic agent of another person and has made a material error during the creation of a data message ... The corollary of this is that an agreement is formed when the natural person, which can only refer to the consumer, interacts with the electronic agent and there is no material error on his or her part.

Section 43(1) also appears to consider the website owner or supplier to be the party making the offer:

A supplier offering goods or services for sale, for hire or for exchange by way of an electronic transaction must make the following information available to consumers on the web site where such goods or services are offered...

Against this, in the experience of the CGSO, section 46 is relied upon by some suppliers to support their argument that, irrespective of the terms of the agreement, all they need do is wait until the consumer cancels and/ or refund any payment made:

(1) The supplier must 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 must immediately notify the consumer of this fact and refund any payments within 30 days after the date of such notification.

It is our understanding that this section does not prevent the consumer from, rather than cancelling the agreement, electing to seek specific performance of the seller's obligation to perform. This is assuming the agreement does not specify otherwise. Section 3 makes it clear that the common law is not excluded but that it must accommodate electronic transactions. Subsection 46(2) merely gives the consumer another remedy and subsection 46 (3) relates only to where performance is impossible.

If we are wrong in our understanding of the above provisions, the ECT Act nevertheless does not specify who the offeror is or that the transaction is only binding when the seller accepts it. This means it is open to align our law with regard to the default position with the broadly accepted practice, namely that clicking on the "I accept" button on a website amounts to acceptance. This approach accords with the dicta in *Jafta v Ezemvelo KZN Wildlife (supra)*, that best international practice should be followed in interpreting the ECT Act.

We are firmly of the view that a South African court would adopt this as being the correct position. In consequence thereof, unless a supplier's terms say otherwise, a supplier is

bound by a consumer's acceptance of the offer and the advertised price. As to whether the supplier has the right to restrict quantities, if this is not specified in the agreement, there appears to be no authority on the question.

That is not an end to the matter. There is still the possibility, even in the default situation, of the supplier raising "snatching a bargain" where there was an error in the price. This usually relates to a situation where the supplier has made a firm offer (e.g. in a face-to-face negotiation) which contains an obvious error and the purchaser tries to take advantage of that by accepting the offer. How it works is if a purchaser is "alive to the real possibility of a mistake", he has a duty to speak and to enquire. If he did not but decided to snatch the bargain, he cannot do so. There would, therefore, have been no consensus, actual or imputed (*Sonap Petroleum (South Africa) (Pty) Ltd v Pappadogianis* (483/90) [1992] ZASCA 56).

Even if snatching a bargain does not apply, the question of whether there was consensus between the parties is still relevant, as is the magnitude of the error. A consumer ought to be aware that a large error is a mistake and as such not intended by the seller.

The ECT Act only provides, in section 20, for what happens if the consumer (natural person) makes the error. There is no similar provision for what to do if the supplier makes a mistake, including in the price.

The following news report illustrates the extent of the risk that pricing errors pose to businesses:

An online petition has helped force M&S to honour orders for Panasonic 50 inch 3D plasma televisions after shoppers snapped up the sets for just £199 following a pricing blunder.[The original price was £1,099.]

The petition, called 'Marks & Spencer supply our tv's that we paid for' was set up by customers after M&S cancelled their orders saying the price was an error.

In an effort to back out of the deal and prove the customer wrong, M&S had refunded customers and credited them with a £25 goodwill gesture. However, faced with a group determined for M&S to fulfil their orders, the retailer took what it said was 'a business decision' and changed its mind.

M&S' story is very different to a well-documented case of Argos selling TVs on its website at the wrong price. In September 1999, Argos offered a 21-inch television priced at £299 for £2.99. Almost 1 million orders were taken before the mistake was noticed and one customer alone ordered 1,700 sets. Argos successfully refused to

honour the orders arguing a mistake had been made. The customer who ordered such a large quantity must have had a suspicion that something was wrong.⁸

The website <http://www.out-law.com/page-429> carries the following report:

When Digilandmall.com mistakenly priced a printer at Singapore (SGD) \$66 rather than around SGD \$3854, at least six people placed multiple orders which were automatically processed by the website. Later that day Digiland became aware of the error and told its customers that their orders would not be fulfilled. The customers challenged this decision in the Singaporean courts, but lost – the court decided that the customers had actually been aware that there was a mistake as to the price of the printer before they placed their orders and therefore there was no agreement between the parties.⁹

At para 145 of the case, Judge Rajah JC concluded:

If the price of a product is so absurdly low in relation to its known market value, it stands to reason that a reasonable man would harbour a real suspicion that the price may not be correct or that there may be some troubling underlying basis for such a pricing. He would make some basic enquiries to ascertain whether there is anything faulty with the product in an attempt to seek an explanation for or understanding of the basis for the price discrepancy; he might alternatively try and ascertain whether perhaps the price differential is part of some spectacular promotional exercise. If there appears to be no reasonable explanation for an absurd price discrepancy, it is axiomatic that any hasty conduct, such as the plaintiffs', in "snapping up" products, should be punctiliously scrutinised and dissected. What amounts to "snapping up" is a question of degree that will incorporate a spectrum of contextual factors: what is objectively and subjectively known, the magnitude of the transaction(s), the circumstances in which the orders are placed and whether any unusual factors are apparent.

The <http://www.out-law.com/page-429> website offers suppliers the following advice:

The important factor is to make it clear that by placing an order the customer is making an offer on the site and that the contract will be formed only if the customer's order is accepted by the seller. It must be clear that taking payment from the customer's credit card does not indicate acceptance...

⁸ <http://www.thisismoney.co.uk/money/bills/article-2089372/Marks--Spencer-Panasonic-50-inch-3D-TV-glitch-Petition-forces-M-S-honour-orders-199.html>.

⁹ The case report is available on: <http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/cases-in-articles/intellectual-property-licensing/1575-chwee-kin-keong-and-others-v-digilandmall-com-pte-ltd-2004-2-slr-594-2004-sghc-71>.

Therefore the terms should explain that, while the customer's card may be debited before the contract is formed, if the customer's order is ultimately rejected, a full refund will be made immediately.¹⁰

Summary

A supplier can specify in its terms when an ecommerce transaction is completed, so long as this is brought to the attention of the consumer. If it does so and indicates that the contract will be formed only if the customer's order is accepted by the seller, the seller is not bound by an error in the price. If, however, the supplier does not make such a stipulation, the default position is that the agreement as well as any error in the price becomes binding upon acceptance by the consumer. This is unless there was such a large discrepancy with the usual price that a consumer ought to have realised that there was a mistake.

¹⁰ See also: <http://www.telegraph.co.uk/finance/personalfinance/money-saving-tips/10602641/Price-glitches-Do-retailers-have-to-honour-pricing-mistakes.html>; https://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/354/vol1_no1_art2.pdf?sequence=1.

Sales records

26. (1) This section does not apply to a transaction if—

- (a) section 43 of the Electronic Communications and Transactions Act applies to that transaction

Summary section 26: A supplier of goods or services must provide a written record of each transaction.

Section 43 of ECT: [Information to be provided](#)

Catalogue marketing

33. (1) This section does not apply to...

- (b) a transaction if Chapter 7 of the Electronic Communications and Transactions Act applies to it.

Summary section 33: A supplier must disclose specified information if an agreement for the supply of goods or services is not entered into in person.

Chapter 7 of ECT:

- 42. [Scope of application](#)
- 43. [Information to be provided](#)
- 44. [Cooling-off period](#)
- 45. [Unsolicited goods, services or communications](#)
- 46. [Performance](#)
- 47. [Applicability of foreign law](#)
- 48. [Non-exclusion](#)
- 49. [Complaints to Consumer Affairs Committee](#)

Additional requirement

The ECT Act may also apply in addition to the requirements of the CPA, as does ECT section 45 in addition to CPA section 11 (right to restrict unwanted direct marketing).

Section 45 of ECT:

45.(1) Any person who sends unsolicited commercial communications to consumers, must provide the consumer—

(a) with the option to cancel his or her subscription to the mailing list of that person;
and

(b) with the identifying particulars of the source from which that person obtained the consumer's personal information, on request of the consumer.

(2) No agreement is concluded where a consumer has failed to respond to an unsolicited communication.

(3) Any person who fails to comply with or contravenes subsection (1) is guilty of an offence and liable, on conviction, to the penalties prescribed in section 89(1).

(4) Any person who sends unsolicited commercial communications to a person who has advised the sender that such communications are unwelcome, is guilty of an offence and liable, on conviction, to the penalties prescribed in section 89(1).

Conversely, the sections of the CPA that do not specifically say they do not apply to electronic transactions, may apply to such transactions where applicable, in addition to the ECT Act requirements.

If both the CPA and the EFT Act appear to be applicable, CPA section 2(9) applies:

2(9) If there is an inconsistency between any provision of this Act and a provision of any Act not contemplated in subsection (8)—

(a) the provisions of both Acts apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second; and

(b) to the extent that paragraph (a) cannot apply, the provision that extends the greater protection to a consumer prevails over the alternative provision...