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EU TRADE RELATED ASSISTANCE PHASE II

Consultative Workshop on Draft Electronic Transactions Act

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Core provisions of the Electronic Transactions Act

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Pillar I - Legal issues with relevance to Electronic Transactions – Enabling nature of the ETA

- The Act applies to electronic transactions conducted by all possible entities, i.e. commercial operators, public bodies and private citizens, including consumers.
- One consequence of that wide approach is the general principle underlying the Act that the Act does not affect any existing or future substantive law, e.g. contract law and commercial law. Likewise, the Act does not amend any law applicable to public bodies, e.g. administrative law.



Scope of application of the ETA

The scope of application of the law – exclusion of certain areas:

- In particular, paragraph 1 **excludes areas that are usually under the purview of the national central bank or that already have a uniform legal regime.**
- Paragraph 2 **excludes certain documents that are usually considered not yet suitable for use in electronic form.**
- However, that can change within time, so flexible approach allowing the Minister to to review and amend the list of excluded matters in light of evolution in business practice, law and technology.



Exclusions – scope of application

- Why transactions on a regulated exchange and foreign exchange transactions are excluded from the scope of the ETA?

Information for consideration - with nearly 26,000 individuals in the U.S. having lost \$460 million in currency-related swindles between 2001 and 2007, the growing incidence of forex fraud led the CFTC to set up a special task force in August 2008 to deal with the problem. (Information from <https://www.sec.gov/answers/forcurr.htm>)



Principle of prohibition of discrimination against electronic transactions

- This fundamental principle mandates that electronic transactions cannot be legally penalised only because of their nature.
- However, the law sets forth additional conditions to establish the equivalence between electronic and paper-based communications.



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Principle of Party Autonomy – narrow and precise scope of application, which includes:

- ***Positive freedom*** – parties can use or accept electronic records, but a party's agreement to do so may be inferred from the party's conduct.
- ***Limitation***: the provisions of this Act may be derogated from or their effect may be varied by agreement, unless that agreement would not be valid or effective under applicable law



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Principle of Party Autonomy

- **Principle of Party Autonomy** in the Act - the use of electronic means is voluntary, but can be implicit.

Further legal consequences may be drawn, as the dispatch of an email implicitly means:

- a) the consent to using electronic means, namely emails; and
- b) the implicit designation of that email address as a designated electronic address;
- c) the agreement to use electronic means requires the consent of all concerned parties.

National consumer law and administrative law, referred as “applicable law” that may not be derogated.



Legal issues with relevance to electronic transactions:

- **Location** – as a general principle of contract law, the parties to a contract should be properly and unambiguously identified, that means that location of the parties must be determined:

“a party’s place of business is presumed to be the location indicated by that party, unless another party demonstrates that the party making the indication does not have a place of business at that location”.



How the ETA would fit into the legal framework of the PNG – other laws and regulations?

- Nothing in the ET Act affects the application of any legal provision that may require the parties to disclose their identities, places of business or other information, or relieves a party from the legal consequences of making inaccurate, incomplete or false statements in that regard.



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Pillar II – Electronic Transactions

LEGAL RECOGNITION OF DATA MESSAGES - principle of prohibition of discrimination against electronic transactions

This fundamental principle mandates that electronic transactions cannot be legally penalised only because of their nature. The law sets forth additional conditions to establish the equivalence between electronic and paper-based communications.



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The principle of functional equivalence approach - requirement for writing and originals

- In order to implement the principle of functional equivalence between paper-based and electronic communications with respect to the notion of “writing” or “written form” – a special provision is included to the ETA.
- Whenever the law of Papua New Guinea requires the written form, that requirement is satisfied with the use of electronic means as long as the electronic message is “accessible as to be usable for subsequent reference”.



Why originals would be required?

Reliability is a flexible notion that depends on a number of circumstances such as type of business relation, amount and number of transactions, type of business, etc.

The rationale for requiring the “original” form in paper-based documents is the need to ensure that the document has remained unaltered since its conclusion.

The Act establishes that such requirement is met in an electronic environment if there is “reliable assurance as to the integrity of the information from the time when it was first generated in its final form”.



The Act is drafted in a technologically neutral manner so that it will not prevent the use of new technologies, once available, which could provide the same or even a higher level of reliability at reduced cost.

A different notion of integrity applies to electronic transferable records due to the fact that their content is normally supposed to change during their life cycle.



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ADMISSIBILITY AND EVIDENTIAL WEIGHT OF DATA MESSAGES

Since Papua New Guinea has already adopted specific provisions on electronic evidence in the Evidence (Amendment) Act, no. 37 of 2016, section 11 refers to those provisions to ensure their application and proper coordination among Acts.



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RETENTION OF DATA MESSAGES

- The requirements to establish functional equivalence with respect to the notion of “retention” are set by this section. In case additional information is available (for instance, because of timestamping services), this should also be retained.
- Usually, this requirement is satisfied with the assistance of a third party service provider - for the sake of clarity it is confirmed. The general principle that functional equivalence requirements may be satisfied with the assistance of a third party service provider applies throughout the law.



RETENTION OF DATA MESSAGES

Retention of data messages electronically must satisfy 3 conditions simultaneously:

- (a) accessibility - the information contained in the data message should be accessible for subsequent reference; and
- (b) unchanged / secured format - the data message 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) trace / identify the origin - such information is retained as enables the identification of the origin and destination of a data message and the date and time when it was sent or received.



RECOGNITION BY PARTIES OF DATA MESSAGES

Based on the principle of non-discrimination, once parties have agreed to use data messages, they may not repudiate those data messages on the exclusive base of their nature.

Those messages may, however, be invalid on any other ground (e.g. because they do not meet the requirements for substantive equivalence).



ATTRIBUTION OF DATA MESSAGES

- Provisions on the attribution of data messages are of particular importance, as they implement a few basic principles.
- The originator may act directly, with the help of a third party or by using an automated message system.
- Parties often will agree on the procedure to identify the originator, even implicitly: for instance, the telephone number, in case of SMS, or the name of the sender in the header of the email.
- Duties of care may arise in case the procedure identifying the originator does not operate as intended.
- The provisions on electronic signatures also aim to identify the originator of an electronic message and, in the practical use, may prevail. Moreover, attribution of data messages will often be agreed contractually. This may explain why, although provisions may provide useful guidance, it is seldom used for litigation.



TIME AND PLACE OF DISPATCH AND RECEIPT OF DATA MESSAGES

Determination of the time and place of dispatch and receipt may have a number of consequences, for instance, in determining when a contract is concluded.

Traditional rules on time and place of dispatch and receipt may not find easy adaptation in an electronic environment, because several options are available :

- 1) Agreement of the parties (originator and addressee);
- 2) The time of dispatch of a data message (could be indicated in the message), could be time when the message leaves an information system under the control of the originator (or party authorised to act on behalf of originator);
- 3) The time when the data message is received (entered the system or made known to the addressee).



TIME AND PLACE OF DISPATCH AND RECEIPT OF DATA MESSAGES

Place of dispatch – relevant and connected to the issue of time (as local time could be indicated):

- A data message is deemed to be 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.
- Regard should be paid to the fact that the place where the information system supporting an electronic address is located may be different from the place where the data message is deemed to be received.



ACKNOWLEDGEMENT OF RECEIPT

Acknowledgement of receipt is a common practice that may be greatly facilitated by the use of electronic means.

Private parties often agree on the technology most appropriate for their purpose.

Public bodies often decide to use a specific technology, to be determined by regulation, for sensitive communications such as serving judicial acts or sending tax-related information. In those cases, the need for acknowledgment of receipt is already contained in applicable substantive law (e.g., civil procedure code or tax code) and the regulation simply enables that procedure in an electronic environment.



ACKNOWLEDGEMENT OF RECEIPT

Specific principle applicable for electronic data exchange: where the originator has explicitly stated that the data message is conditional on receipt of the acknowledgement, the data message is treated as though it has never been sent, until the acknowledgement is received.

Where the originator receives the addressee's acknowledgement of receipt, it is presumed that the related data message was received by the addressee. However, that presumption does not imply that the data message corresponds to the message received.

Safeguard clause: the provision of the Act are not intended to deal with the legal consequences that may flow either from that data message or from the acknowledgement of its receipt, they have to be set up by the parties in their respective contractual relations.



Pillar III – Electronic Contracting

- The fundamental principle of non-discrimination against electronic means in relation to contracts – essential for formation and validity of contracts.
- Where an electronic communication is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that an electronic communication was used for that purpose.
- Nature of contracts is not relevant - any contracts with commercial or public entities or with a consumer, in line with the broad scope of application of the Electronic Transactions Act (reference to various types of e-commerce).



INVITATIONS TO MAKE OFFERS

A contractual proposal contained in an electronic communication without being addressed a specific party, but generally accessible to parties making use of information systems, is considered an invitation to make offers and not a binding offer, unless the intention to be bound in case of acceptance is clearly indicated in that proposal (and proposal is also given to specific parties).



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USE OF AUTOMATED MESSAGE SYSTEMS FOR CONTRACT FORMATION

Application of the principle of non-discrimination against the use of electronic means in respect to the use of automated systems:

- A contract concluded with the use of automated message systems is valid and enforceable despite the fact that no natural person reviewed or intervened in the actions carried out by the system. In those cases, the system is usually pre-programmed to carry out the action (for example, orders made automatically).



AVAILABILITY OF CONTRACT TERMS

Principle of application of **general rule of law** requiring a party that negotiates some or all of the terms of a contract through the exchange of electronic communications to make available to the other party those electronic communications which contain the contractual terms in a particular manner, neither it relieves a party from the legal consequences of its failure to do so.

This is a safeguard provision reminding that the Electronic Transactions Act does not affect any obligation of disclosure contained in other law.



ERROR IN ELECTRONIC COMMUNICATIONS

- Purpose of such provision is to protect natural persons from input errors in light of the peculiar features of the interaction between humans and machines.
- An input error may be withdrawn only if these rather stringent conditions are met:

a) the input error is made by a natural person dealing with an automated message system;

b) the automated message system does not provide an opportunity to correct the error;

c) the party in error notifies as soon as possible the other party of the error;

d) the party in error has not received any benefit from the transaction.

Therefore, if the automated message system provides a possibility of reviewing and confirming the information entered, the provisions do not apply.

In case of instant delivery of the good or service (for instance, download of digital goods), it might be difficult, if not impossible, for the party invoking the error to prove that it did not receive any benefit from the transaction.

- In practice, the Act encourages the adoption of mechanisms for the review of electronic transactions by physical persons, thus reducing input errors.



Additional information

- The provision, originally drafted for electronic transferable records, has been broadened to encompass all types of electronic records.
- It enables the inclusion of information in an electronic record that may not, due to its nature, be included in a paper-based document (for example videos, 3-dimensional graphics, etc.). This is practical recognition to smart contracting and similar emerging business practices.



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Thank you for your attention!
Any questions?



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