

Submission on E-Commerce Green Paper

General Comment

- The E-commerce Green Paper is, unlike other Green Papers and policy documents, not so much a list of concrete proposals as questions.
- The main criticism of the Green Paper is its unstated assumption that there ought to be dedicated e-commerce law. It does not distinguish clearly between policy and law. There can and ought to be e-commerce policy but this does not necessitate law.
- By far the most important issue is whether there is anything about e-commerce that distinguishes it from other commerce and therefore requires anything distinctive. When postal services were introduced there was no need for “ post-commerce” legislation. Commerce via the post was governed by the common and statutory law relating to contract, tax, companies, banking etc. There was a need for the courts to apply, interpret and discover common law to settle such questions as the jurisdiction of a postal contract. It is not obvious that such interpretations or applications of pre-existing law to e-commerce are necessary. There do not appear to be sufficiently serious or urgent problems that warrant the usurpation of the function and course of common law evolution.
- When telexes and other methods of communication were introduced there was no “ telex-commerce” law, “ telegram-commerce” law, and “ telephone-commerce” law. So why “ e-commerce” law?
- The last of these is particularly important since e-commerce (and the entire internet) is essentially nothing other than the extended use of a telephone. The essential question is whether e-commerce over a phone line is jurisprudentially any different from speaking or communicating via fax, telex or telegram. The answer seems to be “ no” .
- Indeed, it is questionable whether e-commerce differs significantly from commerce by regular post (“ snail mail”) let alone by electronic means. Are there really issues that differ from those that have been experienced and resolved over thousands of years of remote interaction where the parties are not in each other’ s presence. Even then almost every supposed e-commerce issue arises.
- The similarities between regular post and electronic communication explain why two technologically diverse phenomena – with virtually nothing in common – have traditionally been

combined into ministries of “ Posts and Telecommunications” .

- A further technological point is that all phone line (and other cable) communications are indistinguishable for users from the use of radio or infrared waves, and, potentially the firing of sub-atomic particle streams. Thus, from the use of cleft-stick bearing runners and carrier pigeons in the past, to the use of the most advanced technology in future, there appears to be a solid jurisprudential continuum with very little, if any, need for new law.

- This simple fact probably explains why virtually no country has adopted special e-commerce legislation, especially not countries in which most e-commerce occurs and in which it has occurred in the most diverse and complex forms for the longest time.

- This is the principal argument against dedicated e-commerce legislation. On the other hand there are compelling arguments “ for something to be done” about this apparently new phenomenon which is not really new at all. What then is it about e-commerce that is distinctive? The answer seems to be:

(a) Commerce by means of electronic communication being conducted on an unprecedented scale. What is meant by “ an unprecedented scale” ? At any other time in the past century it would have been true to say that commerce was being conducted “ on an unprecedented scale” electronically. Perhaps the real difference is the apparent accelerated rate of increase, or a shift in the ratio of non-electronic to electronic commerce.

(b) There seems to be a quantum increase in the ease with which commerce can be conducted electronically, and in the appetite for doing so.

(c) There is renewed interest in and uncertainty about the legalities of concluding contracts electronically, including the technique of using digital signatures. While there is nothing jurisprudentially new involved it might facilitate the evolution of e-commerce for the law to settle such technical issues. However, legislators should proceed with caution as any law on the matter runs the risk of frustrating the rapid and important development of new concepts and technologies.

- This brings us to a second crucial aspect of the matter in respect of which the Green Paper does not appear to be sufficiently sensitive: the risk of legislation being overtaken by and working against technological progress. If there is to be legislation it would need to be minimally prescriptive and maximally accommodating.

- The Green Paper unintentionally creates an impression that there is a presumptive need to legislate simply because something is happening rather than in response to a real problem. The Green Paper does not refer, as policy documents usually do, to real world problems on a significant scale that have to be resolved urgently. Business should not be regulated simply because it occurs.

Contractual aspects of e-commerce

- This brings us to the few seemingly important specifics. Given that e-commerce is simply business conducted over a phone line, it is, and should remain, governed by the same laws that govern any other business. But there are some issues that could perhaps be resolved productively, the most crucial of which is how and where contracts are concluded. The present author has not heard of any good reason why this should not be left to existing common law, (according to which the courts weigh up the evidence objectively to determine whether there is real consensus ad idem, and when and where precisely it was achieved). E-commerce law might facilitate matters by providing that contracts are presumed to be concluded at the place and time where acceptance, with or without a digital signature, was received (or despatched).

Fraud

- The risk of fraud is often raised. Fraud is an omnipresent risk in all commerce and has always been so. Its presence or absence should continue to be dealt with in the ordinary course of the law.

Cross border E-Commerce

- There are many specific issues raised in the Green Paper. None of them appear to deal with anything fundamentally new. One of the issues is that of cross-border e-commerce, and especially when this results in the unauthorised use of foreign exchange and the evasion of customs liability. E-commerce does not create fundamentally new possibilities for violating exchange control regulations. Precisely the same purchases can be made orally, or by telex or fax, over a phone line, or by the use of credit cards whilst travelling. What is distinctive about e-commerce is the increased scale and ease of such transactions. This appears to be a matter for resolution by exchange control authorities (the Reserve

Bank or Dept of Finance) which should not be a concern of or regulated by a government department concerned with commerce?

Non-tangible trade

- There is one apparent exception in the case of customs duties: products that can be delivered electronically. Physical products that are imported or exported are governed by the normal tariff laws and nothing new needs to be said about them. However, a relatively small amount of e-commerce occurs in purely electronic form, such as the purchase of electronic literature and software. Once again there is nothing unprecedented. Many other non-tangibles have been traded electronically in the past, governed by the ordinary laws of the land, without the need for dedicated legislation, such as consulting services, copyrights and royalties, goodwill, franchises, etc. Many consulting contracts are concluded by phone or post, and the product delivered and paid for without the parties ever meeting. Insurance and travel arrangements are similarly concluded.

E-commerce and the law

- This brief document serves no purpose other than to address the fundamental questions related to e-commerce and the law rather than the great deal of detail raised in the Green Paper. Perhaps the best response to the Green Paper, which is essentially a large number of questions about the possible need for dedicated law, is answering questions with questions.

(a) What precisely is there about computer-based e-commerce that distinguishes it from other forms of e-commerce (telex, telegram, telephone, fax)?

(b) Is the ever-increasing volume and simplicity of e-commerce a reason in itself for more regulation?

(c) Do existing laws – statutory and common – governing all aspects of commerce not adequately address all the issues raised in the Green Paper?

(d) Why should South Africa consider e-commerce legislation when it accounts for less than ½% of global e-commerce whilst the main participants have not seen fit to adopt dedicated legislation?

(e) Would legislation of any kind not do more harm than good by freezing the status quo at a time when technology and techniques are changing at breath-taking speed?

Non-e-commerce issues

- There are many issues raised in the Green Paper that are not strictly speaking e-commerce matters. It is essentially a grab-bag of all issues to do with the internet. Domain name registration, ownership and transfer are important issues in their own right. Registration is, or should be, a largely administrative issue. Ownership is a property rights question. Transfer is a matter of contract. Counter-intuitively therefore domain name issues are not e-commerce.

Policy versus legislation

- This comment started by distinguishing between policy and legislation. A private sector response to the Green Paper might consist of proposals regarding the policy that should be adopted rather than to propose legislation. This is an important issue that cannot be adequately addressed in this brief paper. It would cover such issues as what the government might do instead of regulation to facilitate e-commerce, such as amending exchange control and customs laws, deregulating telecommunications, reforming education and training laws and regulations, circulating explanatory literature to judges and magistrates, and the like.

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