



AN BILLE UM THRÁCHTÁIL LEICTREONACH, 2000
ELECTRONIC COMMERCE BILL, 2000

EXPLANATORY AND FINANCIAL MEMORANDUM

General

The purpose of the Electronic Commerce Bill is to create a legal framework for electronic commerce in order to facilitate the growth of electronic commerce and electronic transactions in Ireland. Such a legal framework will help to engender trust and confidence in the Irish electronic commerce environment. The Programme for Government – An Action Programme for the Millennium – as reviewed in November 1999 has as a key priority “to promote a pro-competitive environment in which e-business will flourish and to legislate for electronic signatures and contracts”. This Bill is intended to meet this priority by providing a comprehensive piece of legislation which addresses many of the legal issues that have arisen as a result of electronic commerce.

The International context

One of the purposes of the Bill is to transpose the European Union’s Electronic Signatures Directive, 1999/93/EC into domestic law. This Directive is aimed at harmonising the legal acceptance of certain electronic signatures throughout the EU. The Bill is also intended to transpose into domestic law certain articles of the draft Electronic Commerce Directive which is expected to be adopted in the near future. In 1996 the United Nations Commission on International Trade Law published a Model Law on Electronic Commerce. The Model Law is intended to provide a model to assist states in enhancing their legislation governing the use of alternatives to paper-based methods of communication. Many sections of the Bill are based on the model law.

Section 1 sets out the short title of the Bill and provides for the commencement of the Bill, in whole or in part, by Ministerial order.

Section 2 is the interpretation section for the terms used throughout the Bill. The definitions are designed to be technology neutral and, in so far as is practicable, to reasonably stand the test of time and technological progress. Many of the definitions are based on those in the Electronic Signatures Directive. The following are the most significant definitions:

“addressee” is defined to include only the intended recipient of an electronic communication and not the numerous intermediaries which may provide services relating to an electronic communication;

“electronic signature” is defined to encapsulate the full range of electronic signatures, from the simplest to the most advanced, which serve as a method of authentication when attached to other data;

“electronic communication” is defined to include all possible communications in electronic form, excluding a person to person telephone conversation;

“public body” is defined to include all Ministers and Government Departments and Offices which deliver a public service. Also included in the definition are bodies established by law or by Ministers for non-commercial public purposes. This would include all Government agencies established for such a purpose.

Subsection (2) clarifies that in the application of this Bill, the word “writing” shall be construed as including electronic writing for the purposes of interpretation of other laws. This is designed to clarify that for the purposes of this Bill the definition of “writing” in the Interpretation Act, 1937, includes electronic writing. Many laws make reference to writing under hand. Under this section electronic writing shall also be deemed to be writing under hand.

Subsection (4) provides that, where in legal proceedings a question arises as to whether a particular body is a public body for the purposes of this Bill, the Minister responsible for that body may issue a document clarifying whether the body was established for a non-commercial public service.

Section 3 provides for the Minister to make regulations under the Bill.

Section 4 provides for the laying before the Houses of the Oireachtas of orders or regulations made under the Bill.

Section 5 provides for the expenses of the Minister.

Section 6 provides for prosecution of offences under the Bill.

Section 7 provides that certain persons shall be guilty of an offence should that offence be carried out by that person on behalf of a body corporate.

Section 8 provides for the penalties for offences committed under the Bill.

Part 2 of the Bill provides *inter alia* for legal recognition of electronic signatures, electronic originals, electronic contracts, retention of electronic documents and admissibility of evidence in courts.

Section 9 provides for the fundamental principle that information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in electronic form. This section is not intended to override the requirements contained in the subsequent sections of *Part 2*. It merely indicates that, if information is presented or retained in electronic form, this fact cannot be used as the only reason for which that information would be denied legal effect, validity or enforceability. However, this section does not establish the legal validity of any given electronic communication or the information therein. The section also covers information which is incorporated by reference. This is particularly important for electronic documents, which often refer to provisions which are detailed elsewhere rather than producing them in full.

Section 10 provides for those laws in respect of which the electronic commerce enabling provisions of the Bill will not initially apply. Documentation such as wills, trusts and enduring powers of attorney are excluded. In the case of land law, the law relating to the

transfer of land is excluded. However, the contracts are not excluded. The law governing the making of affidavits or statutory or sworn declarations and the rules of court are also excluded. The intention is to extend the electronic commerce enabling provisions of this legislation to all excluded laws as soon as this is feasible. The section is intended to give the Minister, in consultation with other relevant Ministers, the power to reduce the list of excluded laws by regulation in the light of technological and other developments. *Subsection (3)* is designed to allow pilot projects to proceed.

Section 11 provides protection for the law relating to taxation or other Government revenue. The regulations made under the Companies Act, 1990, which provide for the electronic transfer of shares are similarly protected.

Section 12 provides that, where writing is required, that requirement can be met by writing in electronic form. The section is intended to set out the basic standard that is to be met by information in electronic form in order to be considered as meeting a requirement that information be “in writing”. The section is not intended to establish a requirement that in all instances information in an electronic form should fulfil all conceivable functions of writing. It focuses upon the basic notion of the information being reproduced and read by reference to an objective criterion, namely that the information must be accessible so as to be useable for subsequent reference. The term “accessible” is meant to imply that information in electronic form should be readable and interpretable, and that the software and hardware that might be necessary to render such information readable should be retained.

This section, like the subsequent sections of *Part 2*, only applies in the case of a public body where the public body consents to the giving of the information in electronic form and where that public body’s information technology and procedural requirements have been met. Any such requirements will need to be made public and be objective, transparent, proportionate and non-discriminatory. This provision is intended to clarify that public bodies are free to lay down requirements when receiving information in writing and are not obliged to accept information in whatever form it is sent. A person may only give information in writing in electronic form to another person, who is not a public body, if he or she consents to receive it in that form. While private bodies are free to lay down procedures, terms and conditions for transactions and communications, the procedures, terms and conditions under which public bodies operate are often specifically laid down by law. For this reason a distinction is made between the two in this and subsequent sections. *Subsection (3)* clarifies that the section is without prejudice to any other information technology requirements laid down in other legislation.

Section 13 provides that an electronic signature can be used to meet the requirement of a written signature. It seeks to accord the same standing in Irish law to electronic signatures as that accorded to written signatures. As with the previous section, a distinction is made between how public and private bodies consent to accept electronic signatures.

Section 14 provides a method for allowing a signature to be witnessed using an electronic signature. In order for a witnessing requirement to be met, advanced electronic signatures, based on qualified certificates must be used.

Section 15 provides that an advanced electronic signature, based on a qualified certificate, may be used to meet the requirement that a document be sealed.

Section 16 provides that electronic originals can be used to meet a requirement to present or retain information in its original form. It is important for electronic commerce to deal with the issue of originals since many disputes relate to the question of originality of documents. This section is intended to apply to situations where there is a requirement for information to be presented or retained in its original form and is to be distinguished from situations where there is a requirement to retain or produce a paper document (which is dealt with in *section 17*). The section states the minimum acceptable form requirement to be met by electronic information for it to be regarded as the functional equivalent of an original. These requirements emphasise the importance of the integrity of the information and set out criteria to be taken into account when assessing integrity.

Section 17 provides that electronic information can be used to meet a requirement to produce or retain information. It is intended to apply to requirements to retain paper documents as distinct from requirements to present or retain information in original form which is dealt with in the previous section. This particular section is not intended to alter any obligations imposed on a person by law in relation to retaining information or documents including the period of retention. A person must continue to satisfy any and all such obligations. It is also intended to apply to requirements where paper or other forms of a document have to be produced.

Section 18 provides that a contract may be concluded using electronic communications and lays down the principle that a contract shall not be denied legal effect, validity or enforceability solely on the grounds that it is in electronic form. It is not intended to interfere with the existing law on the formation of contracts, but instead to provide increased legal certainty on the issue of the conclusion of contracts by electronic means. *Subsection (2)* is intended to eliminate any uncertainty that an electronic communication may be used for an offer and acceptance of a contract unless the parties have otherwise agreed.

Section 19 provides for situations where there is a question as to whether an electronic communication was really sent by the person who is indicated as the originator. The purpose of the section is not to assign responsibility, but rather to deal with attribution of electronic communications by establishing a number of presumptions.

Section 20 provides for the acknowledgement of receipt of electronic communications. The use of the various levels of acknowledgements available in electronic communications is a decision to be made by the users of electronic communications. This legislation does not intend to mandate the use of any such procedures. The notion “acknowledgement” can cover a variety of procedures ranging from mere acknowledgement of receipt of an unspecified message to an actual expression of agreement with the content of that message. The section proceeds on the assumption that acknowledgement procedures are to be used at the discretion of the originator. The section is not intended to deal with the legal consequences that flow from sending an acknowledgement of receipt apart from establishing the fact of receipt of the electronic communication.

Section 21 provides for the time and place of dispatch and receipt of electronic communications. It is important to be able to determine the time and place of dispatch and receipt of information for many

existing rules of law and this section is intended to provide default rules that will determine when and from where electronic communications are sent, and when and where they are received. These default rules apply depending on whether or not the parties have agreed otherwise, and whether the parties have designated a particular information system for the communication in question.

Section 22 provides for the admissibility of electronic information as evidence in legal proceedings. The purpose of this section is to establish that information cannot be denied admissibility as evidence in legal proceedings on the sole ground that it is in electronic form. The section also addresses the potential difficulties caused by the “best evidence rule”. The section does not address the assessment of the evidential weight of electronic communications, thereby leaving it to the courts to rule on this point in the specific cases in question.

Section 23 provides that the Bill is not aimed at achieving a forced migration to electronic commerce for either the public or private sectors. The Bill does not intend to make it mandatory for public bodies to offer their services and conduct business electronically. The Government’s Information Society Action Plan outlines the Government’s policy that the public sector will embrace electronic commerce as soon as possible. Persons in the private sector are obviously free to impose their own reasonable requirements with regard to interaction with other private parties.

Section 24 provides for a number of offences for the fraudulent use of electronic signatures, signature creation devices and electronic certificates. The offences are designed to address forgery of electronic signatures, and the unauthorised use of electronic signatures. Other offences prohibit the unauthorised use of a certificate for fraudulent or other unlawful purposes and prohibit persons from misrepresenting their identity or authorisation in accepting or requesting certificates.

Section 25 provides for the investigative procedures for the offences created in *section 24*. The purpose of this provision is to provide for lawful access to evidence, only on the basis of a search warrant and where an offence or suspected offence under the Bill has occurred. In some instances the evidence may not be available in intelligible form simply by being seized. The section allows a court to issue a search warrant to require a person to disclose such evidence in intelligible form. The section also makes it an offence to obstruct the service of a search warrant.

Section 26 provides that nothing in this Bill shall be construed as requiring the disclosure of keys or codes that may be necessary to make information or an electronic communication intelligible.

Part 3 of the Bill provides for matters relating to the service providers who issue electronic certificates or provide other services related to electronic signatures. These service providers are known as certification service providers.

Section 27 provides for accreditation and supervision of certification service providers. The section provides that certification services shall not be subject to any prior authorisation, i.e. certification service providers are free to set up business and offer their services without being subject to any licensing or authorisation requirements. However, the Minister may introduce voluntary accreditation schemes with a view to improving the level of service offered. The section also provides that the Minister shall ensure the establishment

of an appropriate system which allows the supervision of certification service providers which issue qualified certificates to the public. The liability of the designated bodies is limited, in that no civil action can be taken against them if they have acted in good faith. The section transposes Articles 3(1), 3(2) and 3(3) of the Electronic Signatures Directive into domestic law.

Section 28 provides for the liability of certification service providers. The basic position is that a certification service provider which issues a certificate as a qualified certificate to the public or which guarantees such a certificate shall be liable for any damage caused to any person who reasonably relies on such a certificate. Such certification service providers will have to ensure the accuracy of all information in the qualified certificate as at the time of issue. The certification service provider will also be liable for damages resulting from failure to register or publish revocation or suspension of the certificate, unless it can establish that it has not acted negligently. The certification service provider may indicate in the qualified certificate limits on its liability, provided these are clear and readily identifiable. The section transposes Article 6 of the Electronic Signatures Directive into domestic law.

Part 4 of the Bill provides for domain name registration in Ireland.

Section 29 provides the power for the Minister to place the registration of IE Internet domain names on a statutory basis. (The two letter code assigned to Ireland is IE). The section lays down the various issues about which the Minister may wish to make regulations.

The *Schedule* provides for citation of the annexes to the Electronic Signatures Directive. Annexes I, II and III of the draft Electronic Signatures Directive contain certain requirements in relation to qualified certificates, certification service providers issuing qualified certificates and in relation to secure electronic signature creation devices.

Financial Implications

Exchequer and staffing costs

The designation of bodies under *section 27* may result in staffing implications for the bodies designated to administer the schemes. It is not possible to predict precisely at this stage the numbers and the costs involved, but it is anticipated that they will be low due to the light regulatory touch provided for in the Bill. The Bill may also lead to accelerated investment in the public sector in information and communications technologies and associated staff training. This is difficult to quantify at this point in time.

*An Roinn Fiontar Poiblí,
Aibreán, 2000.*