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## Taxation, evidential and jurisdictional issues in electronic commercial transactions in Nigeria

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### Abstract

This paper examined the challenges bedeviling the development of legal framework for the electronic commercial transactions (e-commerce transactions) in Nigeria. Nigeria is yet to enact specific legislation to regulate electronic commerce in its jurisdiction despite the geometrical rate of growth and adoption of this method of trade. It specifically posed a great challenge looking at the actual and potential issues in e-commerce in Nigeria. The author in this work, traced the origin and development of e-commerce and the attendant laws applicable in Nigeria, examining their sufficiency or otherwise. In carrying out the research work, doctrinal mode of legal research was adopted, examining both primary and secondary sources of legal research materials within their contextual meanings. It was found that the failure to enact a law which has direct regulatory bearing on e-commerce in Nigeria has led to adoption and application of old circumstantial laws, rules and common law principles to tackle the contemporary problems arising out of electronic commercial transactions, especially in the areas of taxation, evidential and jurisdictional challenges. It was ultimately suggested that there is urgent need to revisit and enact into law, the Electronic Transaction Bill which had already been passed by the National Assembly since 2017.

**Keywords:** taxation, evidential, jurisdictional issues, electronic commercial transactions

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### Introduction

#### Development of Electronic Commercial Transaction in Nigeria and the Attendant Growth of Its Challenges, 1989.

Many years ago in *Esso West Africa v Oyegbola* [1969] 1 NMLR (Pt. 194), the Court in Nigeria took notice and stressed the importance of computer, especially its usage in commercial transactions, when it said, the law cannot be and is not ignorant of modern business methods, and must not shut its eyes to the 'mysteries' of the computer. That was at a time in Nigeria when the laptop computer was relatively unknown, desktop computer known to very few who were educated and handheld computer and phones which can today be found being used by a six-year old Nigerian child could never had been thought possible. No wonder the Court in the above mentioned case called it a mystery.

It is indeed a truism that virtually any commercial transaction can today be done and completed on these 'mysterious' computers which have become the commonest possession in Nigeria. We have thus moved considerably from the old and traditional methods of buying and selling which required, in most cases, personal attendance and physical negotiation between buyers and sellers, to the virtual world, where computers and the internet hold sway as replacement for traditional market-place. Countless numbers and varieties of transactions are today being made online through the instrumentalities of computer within the scope of Nigerians vast purchasing powers.

The paradigm shift to e-commerce in business transaction provides significant advantages such as expanding markets, improving customer services, reducing costs, and enhancing productivity. E-commerce has equally become a global phenomenon, which is however less aggressive in developing economies, where small and medium enterprises struggle to provide infrastructural facilities and internet services at their own expense due to limited government support and infrastructural deficiency. The acceptance of e-commerce mode of business transaction among Nigerians is slow despite the huge population which should be of an advantage.

With Information Communication Technology, new models of commercial interactions are developing, as businesses and consumers participate in an increasingly virtual or electronic market place to reap its attendant benefits. This new technology has made it possible to pay for goods and services over the internet and in many instances, displace the need to handle physical cash or carry heavy cash around which makes people vulnerable to various vices like stealing, robbery and fraud.

Many businesses and individuals have equally become accustomed to the speed and efficiency of electronic technologies and have reorganised their operation to take advantage of the resulting cost benefits derived therefrom. This development has paved way for increased number of transactions to be accomplished and effected through various 'electronic commerce' (e-commerce) channels like; electronic media, including

electronic data interchange, electronic mail, telex, fax and other social media outlets enabled by the internet. Despite the above mentioned benefits, e-commerce transactions are constantly plagued by old and existing legal barriers to the validity and enforceability of such transactions, primary records and documents of which exist solely in the electronic media and interface.

However, the emergence of electronic commerce as a result of the development of the internet has brought with it a number of legal and socio-economic issues. Despite its advantages and promises, the internet lacks the certainty guaranteed by a clear and fixed geographic lines of transit that traditionally characterise the physical trade of goods and services. Also, while Nigeria is transforming itself in the information and computer technology area, there is an accompanying demand that its laws must be relevant to the transition. Not only should the laws be applicable to innovations in e-commerce, they should also be at par with and sensitive to the legal development in electronic transactions and consumer protection in Nigeria.

Although there are plethora of challenges and issues cropping up from the adoption of e-commerce the world over and specifically in Nigeria, some of the key issues, which are the points of focus of this paper, are the evidential, jurisdictional and taxation issues in e-commerce.

The issues of jurisdiction and choice of law are very important in e-commerce. A major problem is which court assumes jurisdiction in a dispute between parties, arising from an e-commerce transaction? Further, which law is to be applied by that court? These questions become apt due to the fact that the parties may reside at different locations with different legal systems. Again, the issue of timing in formation of such contract may determine the issue of jurisdiction or choice of law if the sender and addressee reside in two different countries. Complex issues of conflict of laws arise here. Is it the law of the place of residence of the defendant? Where is that residence, if the only address available is an email address? Some have argued that the current conflict rules can be stretched to accommodate electronic transactions but this is not always an easy task.

Equally, the emergence of e-commerce and its growing popularity has provoked fundamental evidential issues especially in relation to the proof of transactions conducted through the internet. In Nigeria, financial institutions and companies have employed the use of ICT in the provision and delivery of services. Point of Sale (PoS) machines and Automated Teller Machines (ATM) are now basic tools for financial transactions. The records of transactions are no longer in ledgers, but computers and other storage devices.

In an electronic environment, the original of a message is indistinguishable from a copy, bears no handwritten signature, and is not on paper. The potential for fraud is considerable, due to ease of intercepting and altering information in electronic form without detection, and the speed of processing multiple transactions. The evidential issue arising as to admissibility of electronic data or information as evidence has also been to a certain extent, a conundrum, especially as it is difficult to determine what an original electronic document is and what a copy is when the nature of the evidence itself is ethereal. The purpose of various technology currently available and still under development is to offer technical means by which some or all of the functions identified as characteristics of handwritten signatures can be performed electronically. This technique is referred to as 'electronic signatures.' The peculiarities of these issues have exposed the inability of the Nigerian law on evidence to cope with the avalanche of electronically-generated evidence which is the hallmark of electronic commercial transactions.

Specifically, in the traditional trading system which is largely characterised by physical features of shops, market stalls, and overt market, it was easier to levy taxation and collect taxes. However, with the introduction and adoption of e-commerce, largely characterised by virtual trading, which often times do away with physical market structure or the need for the buyers and sellers to meet physically, it has become increasingly difficult for governments at various levels to keep up with the revenue drive through taxation, despite the fact that taxation was and remains the main source of revenue to the Nigerian Government or any government all over the world.

### **Identifiable Challenges of E-Commerce Transactions**

It is worrisome that the internet and e-transactions lack the clear and fixed geographic lines of transit that traditionally characterises physical trade in goods and services. It therefore becomes a pertinent question to ask how and when an internet or e-transaction contract takes place and is completed, the validity of certain online transactions, for example, when it is legal in the jurisdiction of one of the parties but illegal in the jurisdiction of the other party, enforceability of e-commerce transactions especially where it transcends the boundary of one country, and determining which law is applicable to a trans-boundary transaction. It is also appropriate to raise the question here as to which country or state judicial authority is empowered to adjudicate on trans-boundary disagreements and legal issues which may arise from such transactions, especially where there is no treaty or law covering such transaction between the countries or states involved. The method of enforcing such contracts where parties are transacting online from their bedrooms is equally a problem. Questions such as 'where is the residence of a party, if the only address available in the contract documents is the email addresses of the party?' Is it the residence of the registrar for the 'url' for the email account or that of the ISP from where the mail was generated? Does the rule of the 'place of performance' or 'principal place of business of the defendant' become applicable? What if the defendant has warehouses all over the world and can direct supply from a warehouse in China to a centre in Ghana where the goods are required?

Another problem is the lack of specific and relevant laws to regulate the dynamics, transitional, and transformative development in information and technology trading system, especially on evidential issue. While Nigeria is transforming itself in the information and computer technology area, its laws must be relevant to the

transition. Not only should the laws be applicable to innovations in e-commerce, they should also be at par with and sensitive to the legal development in electronic transactions and consumer protection in Nigeria. Many businesses and consumers are wary of conducting extensive business over the internet sequel to the lack of a predictable legal environment governing electronic transactions in Nigeria. This is particularly so for international commercial activities where concerns about enforcement of contracts, data protection, privacy, security and other matters have lingered on, resulting to a consequent decline in large scale electronic business transactions. It is observed that there is lack of recognition of electronic evidence. The Nigerian Evidence Act, as contained in the Laws of the Federation 2004 does not in any way recognise electronic evidence in any of its provisions. This is not surprising because all the legal concepts and indeed evidence envisaged under the Evidence Act are based on a tangible medium like 'document', 'object', 'picture' and the likes.

To this extent, our existing legal framework must be with such adaptations as to give due effect and recognition to the rather new concepts of data messages, digital signature, authentication, amongst other terms associated with electronic transactions in Nigeria. The absence of the traditional physical medium in e-commerce necessitates the adaptation of our existing legal framework to satisfy the requirements of known legal concepts as "instruments", "signature", and "delivery" that are predicated on the use of a tangible (paper based) medium and geographical location. It is, however, disheartening that the Electronic Transaction Bill which has been under consideration by the National Assembly since 2011 is yet to be passed into an Act to take care of this concern. Apart from enacting relevant laws to protect consumers since the existing laws are not specifically targeted at consumers of electronic goods and services, there is equally the need to provide strong, efficient and reliable administrative bodies and agencies to ensure compliance with laws, rules and regulations, as well as provide outlets for consumers of e-commerce transactions to address their grievances. E-commerce requires confidence and trust. One needs to be satisfied that transmitted orders or invoices have not been altered and that they emanate from whoever they appear to be from. There is need for a guaranteed level of privacy/confidentiality with respect to information. In an electronic transaction (not being paper based), the original of a data message is almost indistinguishable from a copy and bears no handwritten signature. This increases the incidence of fraud due to the relative ease in distorting or altering electronic information without being detected.

The absence of specific legislation imposing taxation on e-commerce transactions is another challenge. This is more so in the face of low and decreasing revenue which has incapacitated the Federal Government and many States in Nigeria. This calls for more and effective tax legislation and administration in Nigeria, especially, the collection system in e-commerce transactions. It is an obvious fact that taxation has a major and very important role to play in any given economy. In the contemporary world, there is hardly any government that does not rely on taxation measures, not only to provide the much needed revenue for socio-economic development but also to reduce the inequalities in the wealth distribution of the society. Many times, tax is used to reduce criminal tendencies and to minimize moral decadence in the society. In Nigeria, oil, which has been the mainstay of the economy recently crash in the world market. This has seriously affected the economy, leading to economic recession in Nigeria. Focus has therefore been shifted to the non-oil revenue area of the Nigerian economy. Taxation in e-commerce transactions through legislation may therefore be a fertile area to focus on.

It is equally worrisome that most e-transaction activities take place privately between the parties, oftentimes without any parameter for measuring the value or existence of such transactions. It therefore remains a challenge to evolve a system for verifying and obtaining the revenue due on such transactions. The problem of classification of some online transactions either as goods or services remains a challenge as it enables the applicability of certain laws and regulations targeted at goods and services. Where such transactions cannot be brought within this classification, revenues are lost.

There is also the problem of Nigeria's backwardness among the committee of nations in providing appropriate legislation for the regulation of e-commerce in Nigeria, after two decades of the adoption of such legislation by the United Nations Commission on International Trade Law and several other countries all over the world following suit thereafter. It becomes pertinent to assess Nigeria's place on comparative level among other Nations of the World.

### **Review of Earlier Works**

Akomolede maintained that e-commerce is the buying and selling of goods and services through the internet and that it covers sale of goods through electronic mail or telephone, regardless of the distance or geographical barrier. While it is a truism that buying and selling over the internet has eased commercial and consumer transactions as goods and services are traded more effectively across geographical boundaries, and the parties need not meet physically to discuss the terms of such contracts, the emergence of e-commerce has also come with a number of legal and socio-economic issues which portend grave danger for the consumers of goods and services. It is important to note the precarious legal position in which the consumers find themselves which is exacerbated by the near absence of a discernible legal framework through which the consumers could be adequately protected. Many consumers in e-commerce face a lot of risks arising from the general lack of understanding of the operations of the internet.

Some of the various legal and socio-economic issues affecting consumers in electronic transactions which include data protection, that is, the extent to which the communication (negotiation) between the parties is protected, issues of formation of contract on the internet, jurisdiction and choice of law issues where disputes

arise between the parties, dispute settlement mechanism in electronic commerce, taxation of e-commerce goods as well as taxation of goods and services that are bought over the internet.

On the issue of formation of consumer contracts on the internet, Gringas and Nabarro observed that the determination of the exact time that a contract is formed on the internet remains unsettled! Though there are very elaborate common law rules that govern traditional commercial transactions, but because of the peculiarities of internet contracts, such rules are largely inapplicable to them. It is often difficult to determine whether or not the advertisement of goods or services on the seller's website constitutes a direct offer to prospective buyers or an invitation to them to make an offer. In analysing the above problem, it was observed that a solution to the above puzzle is not readily available as the common law rules and well-known case law authorities on the issue may not be applicable to such electronic transactions as both display and actual sale are often fused together in such transactions. It was suggested that a website owner must design it in a way that prospective buyers or consumers of her goods and services would know whether an offer is being made through the advertisement or it is just an invitation to treat. Similar problem has also been identified with respect to acceptance of an e-offer which could also be problematic as a result of the nuances of internet transactions. He mentioned some problems for consideration and contractual intention in e-commerce.

It is however worthy of note, that despite these uncertainties, it is already settled in the cases of *Thornton v Shoe Lane Parking* (1971) 2QB 163; *Smith v Hughes* (1871) 6QB 597; *Edwards v Skyview* (1964) 1 WLR 399 that contracts could be made online or with machines and it is of no legal consequence that a machine physically completed the contracts. In view of the foregoing, one could safely conclude that it is legal and safe to make contracts on the internet as the validity of such contracts is no longer a subject of controversy, however, the extent to which consumers are protected in such contracts, in view of the peculiarities of the contracts remains a source of concern in contemporary commercial transactions.

On the issue of taxation of consumer goods especially in internet transactions, it has been observed that tax jurisdiction determines which country gets tax income from a transaction. Taxation remains one of the vexed issues that many countries are confronted with as a result of the emergence and growing popularity of internet trading. The problem associated with taxation of consumer goods on the internet was aptly captured by Chaffey when he said;

*How to change tax laws to reflect globalization through the internet is a problem. That many governments have grappled with. The fear is that the internet may cause significant reductions in tax revenues to national or local governments if existing laws do not cover changes in purchasing patterns.*

The extent of the taxation problem is evident in the United States which was reported to have lost between \$3.8 billion of potential tax revenue in the year 2000 as more consumers purchased on-line. The internet is largely a tax free area in the United States of America. This is so because the internet supports the global market place and it therefore does not make good sense to introduce tariffs on goods and services offered over the internet. In 1997, the United States of America President, Bill Clinton, articulated this position in a document titled "A Framework for Global Electronic Commerce", when he said, "*The United States will advocate in the World Trade Organization (WTO) and other appropriate for a that the internet be declared a tariff-free zone.*" Again, it is almost impossible to apply the taxation laws and instruments to products that are offered electronically through the internet.

Eden also observed that in the United Kingdom, the practice over the years has been to apply the domestic tax system, especially as it relates to Value Added Tax (VAT), to transactions or suppliers of goods and services through the Internet. However, collection of VAT on goods supplied through the Internet has faced practical difficulties, but the fear of the potential loss of revenue, if services provided over the Internet are not taxed, has led to an increasing tax regime of 'vatable' goods in the United Kingdom. However, the problems of avoidance, lack of interface between tax systems and lack of tax co-ordination across tax borders have made taxation of electronic commerce to be very difficult. In line with the foregoing position, Eden submitted as follows:

*Tax co-ordination across state borders is critical to establishing systems which will even close to, dealing properly and fairly with internet commerce and one of the easiest ways for states to co-operate is in developing workable classifications which will be operated by users of the tax system.*

The following have been canvassed as reasons for globalisation of the tax system in e-commerce so as to;

1. Avoid inconsistency with established principles of international taxation;
2. Avoid inconsistencies of national tax jurisdiction;
3. Avoid double taxation; and
4. Give room for easy understanding and administration of the tax system.

An integrative framework for taxation of goods bought through the Internet should be put in place. More importantly, it must strike a balance between the interests of the consumers to be protected against over-taxation or double taxation and that of the national or international governments who deserve to be paid taxes on the goods.

Akomolede recommended that it is time for a consumer protection code to be put in place in Nigeria. What we have now are statutory provisions that set up regulatory agencies whose activities are directed at the producers or manufacturers without having the consumers directly in focus. The agencies do not know of the travails of the consumers until complaints are brought to them for investigation. Redress coming to consumers after such investigations are not wholly satisfactory, especially against the background of the difficulties involved in enforcing whatever redress is prescribed or awarded. Even where the consumer is able to seek redress in courts, he is usually hamstrung by such hurdles as the one that emanated, for example, from *Donoghue v. Stevenson* (1932) 2 AC 562 where the consumer must show that the producer or manufacturer owes him a duty of care or had him in his contemplation while making his product. See the Atkinian Neighbour principle in *Donoghue's* case. The futility of relying on negligence as the basis of liability is clearly shown by the Nigerian cases of *Boardman v. Guinness* (1980) NCLR 109 and *Ogbidi v. Guinness* (1981) 1 FNLR 67.

The provisions of the Consumer Protection Act would have taken care of the interest of the consumers to an appreciable extent, but the fact that the powers are given to a statutory body and not in form of a legal or liability regime has underscored the potency of the Council to actually protect the consumers. Akomolede suggested that the approach to consumer protection in the advanced countries is worthy of emulation. The truth is that the laws protecting consumers in Nigeria are incoherent as they are scattered in statutes such as the Sale of Goods Act (and Laws as applicable in the federating states). Sadly, these legislative enactments and the principles of common law do not directly have the consumers in mind. The inevitable conclusion that could be drawn from the foregoing is that consumer protection is still almost a farce in Nigeria of today. Consumers here are yet to reap the fruits of consumerism, which have long yielded fruitful results in the advanced countries of the world. To improve the lot of the consumers in Nigeria, a lot still have to be done in the areas of enlightenment, legislation, regulation and enforcement.

One of the recommendations made by the author is that the laws through which the consumers are protected today in Nigeria are scattered over a number of statutes and the common law. This is not in the best interest of the consumers since this scenario makes enforcement to be very difficult. A leaf should be borrowed from the advanced countries of the world where consumer laws have been reduced to coherent pieces of legislation. Examples of such laws include the Unfair Contract Terms Act, 1977, Weights and Measures Act, 1985, Consumer Credit Act, 1974 and the Consumer Protection Act, 1987, all in the European Union. In India and Japan, the laws protecting the consumers are the Monopolies and Restrictive Trade Practices Act under which Monopolies and Restrictive Trade Practices Commission was set up. The various liability rules governing consumers in Nigeria should be reduced into a coherent piece of legislation, giving rise to a discernible consumer protection regime. In addition, the Consumer Protection Council and the Committees in the states should be made more functional by making funds available to them. Though the state committees are now struggling for relevance in most of the states to make their existence known, funds should be made available to them to perform their consumer protection duties under the Act.

Akomolede's work provides the much desired background required for this work and also provided the insight, especially in the area of problems bedevilling taxation of internet transactions. The work therefore served as a ladder through which this work is pushed to the plane where specific taxation legislation for e-commerce transactions can be debated and cogent suggestions made to fill the gap of the so much desired and required revenue for the Nigerian Government.

It is equally important to examine the Electronic Transactions Bill which was passed by the Nigerian National Assembly. The bill which was first introduced in 2011 during the lifetime of the 7<sup>th</sup> Senate did not germinate into fruition before the expiration of their tenure. It has subsequently been re-introduced, and it is intended by this intended legislation to provide direct legislative framework for e-commerce transaction, and an aspect of the said legislation is equally devoted to taxation of such transactions. The question here is, is this piece of intended legislation sufficient for the various issues already raised in the area of e-commerce transactions and taxation issues arising therefrom?

### **Theoretical Framework**

Certain theoretical frameworks have been adapted for the e-commerce system based on the varying expectations and addressing the challenges therefrom which are analysed in term of best practices possible, anchored on different theoretical perspectives. Some of the theoretical perspectives in literatures espoused and fully considered in this work are Public Interest Theory, Capture Theory, Consumer Right Theory, and Consumer Expectation Theory.

This work is premised on the principles and theories of taxation namely neutrality, administrative efficiency, simplicity, flexibility as well as the e-commerce public interest theory and consumer expectation theory. This is largely due to the perceived need for the protection of consumers of e-commerce transactions by adequate legislation on the one hand, whilst the government equally deserve the necessary revenue from such transactions on the other hand.

### **Summary of Findings/Recommendations**

This research work finds that in Nigeria today, there is gradual and consistent move from the old and traditional way of buying and selling of goods and services, which requires personal attendance and physical negotiation between buyers and sellers to electronic transactions where the computer and internet hold sway as replacement

for the traditional market place. This has been made possible by the advent of electronic means of communication and information transfer. Government, businesses and individuals have therefore taken advantage of these electronic technologies to derive the cost benefits derived therefrom. This development has paved the way for increase in the number of transactions, accomplished and effected through various 'electronic commerce' channels.

It has equally been discovered that the emergence of electronic commerce as a result of the internet has brought with it, a number of legal and socio-economic issues such as the lack of clear and fixed geographic lines of transit traditionally characterising physical trade of goods and services. This problem has developed into a hydra-headed issue of jurisdiction or choice of laws where there are disputes between parties in different countries, where different laws are applicable to similar issues. It is very easy to identify this problem since one of the features or characteristics of e-commerce is globalisation of the market place.

Another finding is that it is not an easy task to tax electronic commerce transactions since parties are not easily located physically, and there are no physical market places where parties meet. Tracking these transactions is even more difficult since the power controlling websites where such trading activities take place may be an entirely different country from that of the buyer or the seller who are the active participants in the transaction. This is becoming dangerous and inimical to the survival of nations who primarily and largely derive revenue from taxation of goods and services to run the affairs of their states. It therefore becomes imperative to examine the existing tax legislations and overhaul, redesign or enact new legislation to tackle this suffocating problem.

It has further been discovered that Nigerian Evidence Legislation is grossly inadequate in tackling the challenges arising from electronic transactions disputes, especially, admissibility of electronically generated evidence from online transactions. The Nigerian Evidence Act is discovered to have been enacted with the traditional methods of trade in contemplation. The introduction of section 84 of the Evidence Act 2011 has not totally resolved this problem. In an electronic environment, the original of a message is indistinguishable from a copy, bears no handwritten signature, and is not on paper. The potential for fraud is considerable, due to ease of intercepting and altering information in electronic form without detection, and the speed of processing multiple transactions. This calls for a total overhauling of the Evidence Act or enactment of an Act to take care of electronic transactions evidential problems.

One other finding in this work is that the United Nations has long recognised the need to enact appropriate legislation to regulate and encourage e-commerce transactions, and many other countries have followed suit in tailoring these legislation to their local circumstances. This is yet to be done in Nigeria, despite the findings that e-commerce activities is on the increase in Nigeria. The Electronic Commerce Transaction Bill currently passed by the National Assembly since 2017 has taken unduly long time to mature into an enforceable legislation through Presidential Assent. There is even need to check the adequacy of the intended legislation by comparing and contrasting its provisions with the ones available in other countries where such provisions have been tested, and discovered to contain lapses which can be prevented in Nigeria, after all, no legislation is perfect.

## Conclusion

It is believed that this work has provided the threshold upon which the government in Nigeria should measure its activities in providing lofty and desired direction for the growth and sustainability of e-commerce in Nigeria. Failure to attend to the various issues raised here will eventually lead into a nose-diving electronic market system with dire consequences for the economy of Nigeria both in the short and long term analysis.

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