

Benchmarking of existing national legal e-business practices

DG ENTR/04/68
Country report - Belgium

Ref	Country profile Belgium
Edition	2.0
Date	14 June 2006
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Belgium

1. General information on the national legal system

Belgium is a **constitutional federal monarchy**. It consists of the federal State, three Communities (based on languages) and three Regions (based on territory). They are on an equal footing but hold powers and responsibilities for different fields. Legislative powers are divided between the three levels based upon their responsibilities. On a lower administrative level we can find the 10 provinces and the 589 communes.

Belgium has a **continental law tradition**. The country's civil law is modelled on the French Napoleonic Code as modified and brought up to date. Belgian courts decide cases by referring to the legal principles and rules contained in the codified and statutory law.

The **court system** resembles very much the French system. The ordinary courts rank in four levels: "Tribunal de Police" (criminal) and "Tribunal des Juges de Paix" (civil) are the lowest levels for small felonies or conciliation matters. Normal starting level (first instance) is the "Tribunal de Première Instance" (civil and criminal), which is called correctional court or juvenile court in criminal matters. Very recently, specialized tax chambers were added to the formal organisation of the courts of first instance.

Commercial courts have lay judges alongside professional magistrates and social law cases appear in the labour tribunal. Heavy offenses appear before the "Cour d'Assises", the only Belgian court with a jury. Appeal level is the "Cour d'Appel", where civil, criminal and commercial matters are dealt with, only the "Cour de Travail" is a specific appeal court for social law cases coming from the lower labour tribunals. Finally, the "Cour de Cassation" is the highest appeal level, dealing only with points of law, no new facts can be brought before this court, just like in the French system.

In principle, courts are not bound by previous decisions of other courts ruling in similar cases. However, jurisprudence is recognised as a valid source of law making and of the unbiased interpretation of legal rules.

Because of the different official languages spoken in Belgium, legal practice has to deal with the fact that the use of either the Dutch or French language in court depends on the region where the court is established.

The parties of a contract are always free to choose **arbitration** for settlement of a dispute.

The typical way to **implement an EU Directive** in Belgium is to make a specific law containing all regulatory provisions. However if a Directive concerns an already regulated field, the regulatory provisions are most often implemented through changes in the existing legislation.

2. Electronic signatures

2.1 National legislation and administrative practices

Belgium already introduced in 2000 in its **Civil Code** the possibility of using electronic signatures by the Act of 20 October 2000 introducing the use of telecommunication tools and the electronic signature in the judicial and extra-judicial procedure.¹ The act is published in the Belgian Official Gazette² of 22 December 2000.

Belgium also **implemented Directive** 1999/93/EC of a Community framework for electronic signatures by the Act of 9 July 2001 introducing a legal framework for electronic signatures and certification services.³ The law was signed by the King on 9 July 2001 and has been published in the Belgian Official Gazette of 29 September 2001 (the Act).

This act is supplemented by the Royal Decree of 6 December 2002 organising the supervision and accreditation of certification service providers issuing qualified certificates.⁴ The decree is published in the Belgian Official Gazette of 17 January 2003 (the Decree).

Belgium has carried out a very **stringent implementation** of Directive 1999/93/EC. The Electronic Signature Act has, for example, an exact transposition of Article 5.1, letter a) of Directive 1999/93/EC. Interesting, however, is that the Belgian law explicitly states that an electronic signature fulfilling the requirements will be assimilated with a hand-written signature "irrespective of the fact that the signature has been put by a legal or a natural person" (art.4,§4 of the Act).

¹ Wet tot invoering van het gebruik van telecommunicatiemiddelen en van de elektronische handtekening in de gerechtelijke en de buitengerechtelijke procedure - Loi introduisant l'utilisation de moyens de télécommunication et de la signature électronique dans la procédure judiciaire et extrajudiciaire.

² Belgisch Staatsblad/Moniteur Belge

³ Wet houdende vaststelling van bepaalde regels in verband met het juridisch kader voor elektronische handtekeningen en certificatie-diensten - Loi fixant certaines règles relatives au cadre juridique pour les signatures électroniques et les services de certification.

⁴ Koninklijk besluit houdende organisatie van de controle en de accreditatie van de certificatie-dienstverleners die gekwalificeerde certificaten afleveren - Arrêté royal organisant le contrôle et l'accréditation des prestataires de service de certification qui délivrent des certificats qualifiés.

Just like the Directive, the Belgian Act describes 3 types of signatures: 1) An electronic signature, 2) An advanced electronic signature, 3) An advanced signature based on a qualified certificate and created with a secure signature creation device ("qualified signature"). Qualified signatures are by virtue of article 4, §4 of the Act 'assimilated' with handwritten signatures. This assimilation is stronger than only a presumption.

The **legal acceptance** rules in Belgium on electronic signatures can therefore be summarized as follows:

1. No electronic signature can be denied legal effectiveness and admissibility as evidence in legal proceedings (art.4, §5 Act).
2. For evidential purposes, an electronic signature can be used as an alternative for a handwritten signature, as long as one can prove that the electronic signature corresponds to a transformation of data from which follows with certainty the identity of the author and the integrity of the contents to be signed (art. 1322 Civil Code)
3. For all legal purposes, the 'qualified electronic signature' will automatically be given the same legal value as a handwritten signature (art.4, §5 Act). A qualified signature is an advanced electronic signature based on a qualified certificate and produced by a secure signature creation device.

Supervision of qualified certification service providers is carried out by the so- called "Electronic Signature Service", which is a service within the administration Quality and Safety, Department Accreditation of the Federal Public Service Economy, S.M.Es, Self-employed and Energy.⁵ The same institution is responsible for the voluntary accreditation.

The supervisory body may control the activities of a CSP issuing qualified certificates at any time on its own initiative. The supervisory body is allowed to require additional information from CSP's.⁶ The control will consist of the examination of the relevant documentation of the CSP relating to the provision of its certification services (incl., Certificate Practice Statement and other policies)⁷ and if necessary, of investigation(s) at the CSP's premises.⁸ In case that the Federal Public Service Economy, S.M.Es, Self-employed and Energy concludes that the CSP does not fulfil the legal requirements it informs the CSP. Unless the CSP remedies its infringements/omissions within a given delay, the Federal Public Service Economy, S.M.Es, Self-employed and Energy will bring the case before court.

⁵ Contact: BE.SIGN@mineco.fgov.be

⁶ art 20, §2 Act

⁷ article 20, Act

⁸ article 7, Decree

Belgium has launched the national electronic identity card (eID) initiative issuing eID's to its inhabitants.⁹ By the end of 2009 more than 9 million eID cards will have been issued. This card incorporates a electronic signature function fulfilling the 5.1 requirements of the Directive and its national transposition in Belgium.

The eID is currently being used for secure authentication towards governmental websites and for signing legal documents in their electronic form, such as the electronic tax declaration¹⁰, VAT declaration, social security, access container park in community, parking ticketing, registered mail¹¹, electronically submitting and signing decrees within Flemish Parliament, iloket (Diepenbeek) and Digitaal loket (Bornem) to request official documents, consultation of National Register record¹², e-library services. Both public and private sectors are continuing to develop a significant number of applications and services compatible with the Belgian eID card.

Major computer manufacturers (Dell, HP, Siemens) and software providers (Microsoft, Adobe) ensure that their products are able to read the eID and to process the signature data.

Microsoft, Certipost and Info2Clear have released Trust2 (Trust Square), an application for MS Office 2003 that allows users to use their e-IDs to authenticate documents. It also provides for an Information Rights Management protection to prevent unauthorised forwarding, copying or printing of the digital content.¹³

It is expected that holders of a Belgian eID will more and more often use their card for signing documents electronically.

2.2 Cross border regulatory issues

Qualified certificates have the same validity and legal recognition, regardless of their country of origin. In principle, qualified signatures from other membership countries are therefore treated in the same way as qualified signatures originating from Belgium.

The technical specifications being used for the Belgian eID are in line with the European and international standards, ensuring their technical interoperability with other initiatives. At this very moment, interoperability testing of different national eID cards (Belgium, Austria, Estonia) is being undertaken.

⁹ FEDICT (Federal Public Service of Information & Communications Technologies) <http://www.fedict.be/>; See also: <http://www.eid.belgium.be/>

¹⁰ See www.taxonweb.be

¹¹ See www.mycertipost.be

¹² See <https://www.mondossier.rrn.fgov.be>

¹³ see <http://www.trust2.com>

3. General elements of electronic contract law

Directive 1997/7/EC on the Protection of Consumers in Respect of Distance Contracts has been implemented by amending the Act on Commercial Practices and Consumer Protection.¹⁴

Directive 99/44/EC on certain aspects of the sale of consumer goods and associated guarantees has been implemented in national law through the Act of 1 September 2004 amending the civil code and the civil procedure code.¹⁵

The national law contains a 2-year limitation period in which the seller can be held liable for the non-conformity. Buyer and seller could agree beforehand that the buyer needs to inform the seller of the lack of conformity within a period of two months from the date on which he detected such a lack of conformity.

Directive 1998/6/EC on Price Indications has been implemented through the decree of 7 February 2000 on the price indication of products and services en on the order form.¹⁶

Directive 2000/31/EC on information society services (eCommerce directive) has been implemented into national law by two laws, namely the Act regulating certain legal aspects of information society services (judicial matters)¹⁷ of 11 March 2003 and the Act regulating certain legal aspects of information society services 11 March 2003 (eCommerce Act).¹⁸

3.1 National legal and administrative practices

The regulatory framework for all contracts is the Belgian civil code and the commercial code. The civil code contains the basic principles of contract law whereas the commercial code contains some specific provisions for conducting business mostly in a business to business environment.

¹⁴ "Wet betreffende de handelspraktijken en de voorlichting en bescherming van de consument – Loi sur les pratiques du commerce et sur l'information et la protection du consommateur, M.B.. 29 August 1991, err., M.B., 10 October 1991.

¹⁵ Wet betreffende de bescherming van de consumenten bij verkoop van consumptiegoederen – Loi relative à la protection des consommateurs en cas de vente de biens de consommation M.B., 21 September 2004.

¹⁶ Koninklijk besluit tot wijziging van het koninklijk besluit van 30 juni 1996 betreffende de prijsaanduiding van producten en diensten en op de bestelbon, M.B. 22 February 2000.

¹⁷ Loi sur certains aspects juridiques des services de la société de l'information visés à l'article 77 de la Constitution - Wet betreffende bepaalde juridische aspecten van de diensten van de informatiemaatschappij als bedoeld in artikel 77 van de Grondwet, MB 17 March 2003.

¹⁸ Loi sur certains aspects juridiques des services de la société de l'information - Wet betreffende bepaalde juridische aspecten van de diensten van de informatiemaatschappij, MB 17 March 2003. See also P. VAN EECKE, and J.DUMORTIER, *Elektronische handel : commentaar bij de wetten van 11 maart 2003*, Brugge, Die Keure, 2003, 335 p.

The basic principle of Belgian contract law is that the conclusion of contracts is not subject to formal requirements unless directly stated in a specific law ("**Consensus principle**"). This principle has been recognised and accepted in numerous court decisions. A written document is not required, as such, to form a contract, which also means that electronic contracts are considered to be just as valid as a traditional paper contract. Still, the eCommerce Act of March 2003 contains an explicit **equivalency principle** for contracts conducted by electronic means as derived from article 9 of the European eCommerce directive.

A few contracts cannot be conducted by electronic means though. There has been a literal transposition of Art 9 (2) of Directive 2000/31/EC excluding specific types of contracts to be concluded electronically. This means that following Belgian law, it is not possible to enter into an agreement by electronic means for contracts that create or transfer rights in real estate, except for rental rights; contracts requiring by law the involvement of courts, public authorities or professions exercising public authority; contracts of suretyship granted and on collateral securities furnished by persons acting for purposes outside their trade, business or profession; and contracts governed by family law or by the law of succession.

There are **no formal definitions** of the concepts of offer/acceptance and contracts in the Belgian contract law. *Both* offers and acceptances are considered valid and binding for the submitting party if they "manifest" a will to be bound in accordance with the content of the manifestation and the manifestation creates an expectation by the receiver of the manifestation that the obligation is established.

The requirement to the certainty of the manifested will varies according a number of factors including, for instance, the content of the expressed will (a promise of a gift of 1.000.000 € requires greater certainty than a promise to enter into a contract between regular business partners), the customs in the area, the status of the parties (consumer/business), etc.

A contractual obligation will, however, only be enforced by the courts, if the party claiming the existence of the obligation can prove before the courts that the parties have actually entered into a valid contract. The practical question of documentation (evidence) of what really is agreed is consequently very important. The normal signature on a piece of paper is in Belgian jurisprudence considered a "seal" of the agreement reached between the contracting parties during previous negotiations. As such, the signed contract is "proof" of the contractual obligation ("**acte sous seign privé**").

As it may be clear from the above, a contractual obligation may arise, when the will thereto has been expressed, even though the parties to the contract have only agreed orally on the most essential elements of the contractual obligations. The same applies for if the

contract is in an electronic format that carries the will to a contractual obligation.

3.1.1 *Electronic invitation to make an offer and submission of an offer*

As there are **no formal requirements** needed for the assumption of a contractual obligation, there is, of course, similarly no legal requirement to use electronic signatures or any other formal requirements in the conclusion of contracts. Some service providers use electronic signatures, however, as an extra security mechanism to prove that the contract has been accepted and entered into by the customer.

The Belgian e-commerce act requires specific information to be disclosed to (potential) customers before the latter place any order. In addition, such information shall be provided in a clear, comprehensible and unambiguous way.

The **minimum set of information** that shall be disclosed are:

- (a) the languages offered for the conclusion of the contract
- (b) the different technical steps to follow to conclude the contract
- (c) the technical means for identifying and rectifying input errors prior to the placing of any order;
- (d) whether or not the concluded contract will be filed by the service provider and whether it will be accessible.

The Belgian **public procurement legislation** allows the introduction of offers by electronic means under condition that the offer has been sealed with a qualified electronic signature.¹⁹

3.1.2 *Electronic acceptance*

Acceptances are binding in Belgian law when they are 1) received by the person who has made an offer within the acceptance period and 2) are in compliance with the offer.

As to the **electronic acceptance** of an electronic offer, the principles of article 11 of the European eCommerce directive relating to placing an order have been transposed into Belgian legislation. This means except when otherwise agreed by parties who are not

¹⁹ Koninklijk besluit van 18 februari 2004 tot wijziging, wat het toegangsverbod tot bepaalde opdrachten en het invoeren van elektronische middelen betreft, van een aantal koninklijke besluiten genomen ter uitvoering van de wet van 24 december 1993 betreffende de overheidsopdrachten en sommige opdrachten voor aanneming van werken, leveringen en diensten - Arrêté royal modifiant, en ce qui concerne l'interdiction d'accès à certains marchés et l'introduction de moyens électroniques, un certain nombre d'arrêtés royaux pris en exécution de la loi du 24 décembre 1993 relative aux marchés publics et à certains marchés de travaux, de fournitures et services, MB 27 February 2004.

consumers, the service provider needs to confirm the order and needs to include a summary of the order. The acceptance is considered to have reached the offeror, when he is able to access the acceptance message.

The Belgian eCommerce Act however has introduced an **extra burden** for the offeror in the sense that he needs to prove that he has sent the confirmation and the summary to the customer. This practically leads to the unnecessary obligation for the service provider to ask for a confirmation of receipt from the customer of the order summary.

Moreover, except when otherwise agreed by parties who are not consumers, that in case where the recipient puts its order by technological means (e.g. e-mail), then the service provider:

To comply with the requirements about the information to be put at the disposal of customers, a Belgian service provider should **in practical terms**:

- a) Clearly specify the languages into which it is prepared to negotiate/accept contracts about the provision of its products and services.
- b) Describe the technical steps to follow in order to place the order. Notably, such instructions shall include the following stages: 1] input your data, 2] select service / product, 3] order, 4] check your order in the shopping basket, 5] agree on way of payment.
- c) Provide a "pre-view" version of the order to customer, on which he can have access to correct possible errors (typing mistakes, etc.).
- d) Ask through a "pop-up" screen customer to check its order before sending it out;
- e) Provide contact details of a help desk or other persons whom the customer can contact in case of problems or in order to ask clarifications or explanations about the on-line order and the way it shall be prepared on-line.

3.1.2.1 Information obligations in relation to electronic contract conclusion

The **legislation in Belgium complies** with the requirements laid down in Article 5 and 10 of Directive 2000/31/EC on electronic commerce, Articles 4 and 5 of Directive 97/7/EC on distance contracts, and Arts. 3, 4 and 5 of Directive 2002/65/EC on distance marketing of consumer financial services, regarding the information that must be given to the consumer before and after the order is placed.

On the grounds of the e-commerce legislation, any provider of an information society service, shall make available on its website (for

any recipient, including competent public authorities) in an easy, direct and permanent way at least the following information:

- (a) the name of the service provider;
- (b) the geographic address at which the service provider is established;
- (c) the contact details of the service provider, including its electronic mail address, which allow it to be contacted rapidly and communicated with in a direct and effective manner;
- (d) where the service provider is registered in a trade or similar public register, the trade register in which the service provider is entered and his registration number, or equivalent means of identification in that registry;
- (e) its unique identification number;
- (f) the codes of conduct to which the service provider has adhered to and instructions on how accessing such codes on-line.

The laws prescribe also that, where the e-commerce activity in question refer to prices, there are to be indicated in clearly and unambiguously and, in particular, must indicate whether they are inclusive of tax and delivery costs.

Same obligations of transparency derive from other sector-specific directives, notably the one regulating the marketing at a distance of consumer financial services. The legislation defines as "financial service" any service of banking, credit, insurance, personal pension, investment or payment nature. In the same vein as the e-commerce laws, this law lays down a number of elements that shall be communicated to consumers before the latter are bound by any distance contract or offer.

In practical terms, in order to comply to these obligations of transparency, direct and permanent accessibility, a service provider shall ensure that:

- (a) this information is provided in clear and simple language and in a visible way, namely through a visible hyperlink;
- (b) it is possible to access this information from any web-page, meaning in practice that a visible hyper-link shall appear on each web-page;
- (c) the hyperlink is very discernable on its website, so that there is no need for the surfer to search for a long time this information on whichever web page he has access (normally,

the surfer must have access to this information through one, maximum two "clicks of the mouse" from the home page).

An examination of hundreds of webpages conducted by the Belgian government (FOD Economie)²⁰ in 2001 has shown that there were **significant problems** in relation to the companies' compliance with the legislation. More than 80% of the investigated websites were missing legally required information relating to distance sales, consumer protection, and data protection. All the companies exposed received a letter from the government asking them to rectify the problems.

3.1.2.2 Standard terms and unfair clauses

Standard terms are only considered a part of the contractual agreement, when the party accepting the standard term has had a chance to read the terms prior to the conclusion of the contract.

Standard terms sent with an invoice or order confirmation or made generally available on the webpage of the seller with direct connection to the actual sale will be considered **part of the contractual agreement** as long as the party being bound by the standard terms, knows that the terms will be applied (for instance from previous contracts).

The Belgian legislation requires that the "contract terms and general conditions provided to the recipient must be made available in a way that allows him to store and reproduce them".

In practical terms, this means that the general T&C shall be made available in a way that enables customers to store and reproduce them. The T&C can be sent to customers by e-mail, on which the T&C are attached in a easily-downloadable file (e.g. a pdf. document). It also means that the T&C can be posted on the provider's web site but : - through a clear and visible hyper link, - accessible from the web-site it relates to and - in a format that can be easily downloaded and printed (note, in this respect, that many web-sites provide a "print-out" facility of their text or link to a pdf. and/or Word document version). Standard terms accepted by a point-and-click acceptance are generally considered agreed between the parties.

The service provider is legally bound to make available to its customers the full text of the T&C or other relevant contractual documents. The communication of the integral text of T&C would, in case of problems, help the provider to prove that it has taken all possible and reasonable steps to inform its customers about the full content of all contractual provisions applicable in each case.

On **unfair clauses**, there is a core legal instrument in Belgium regulating commercial practices - the Act on Commercial Practices

²⁰ See www.mineco.fgov.be

and Consumer Protection ("*Fair Trade Practices Act*" of 14 July 1991 as amended, *sur les pratiques du commerce et sur l'information et la protection du consommateur, M.B.*, 29 August 1991, *err., M.B.*, 10 October 1991). This statute seeks to satisfy two objectives. On the one hand, it aims at promoting fairness in the relations between traders. On the other hand, it envisages ensuring that consumers are protected and adequately informed in commercial relations. The most protective clauses of this regulation protect explicitly consumers.

Under this law, the courts can amend or override a contract or other legal act, either fully or in part, if its application would be unfair or incompatible with good practice. Article 30 and following contain special rules applicable to consumer contracts. These clauses are implementing Directive 93/13/EEC on unfair terms in consumer contracts.

As a consequence of this, consumers in Belgium are not bound by unfair clauses that are not highlighted even though they have clicked on the confirmation button. Unclear clauses are as interpreted against the author.

3.1.3 *Choice of law and forum*

Belgium has ratified the Rome Convention on the law applicable to contractual obligations²¹, the Brussels²² and Lugano Conventions²³ on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

Belgium has on 1 November 1991 without any reservations ratified the United Nations Convention on the International Sale of Goods (CISG).

Directive 2000/31/EC on electronic commerce is based on a country of origin principle, which provides that information society services are only required to comply with the requirements of the Member State in which the service provider is located.

3.2 **Cross border regulatory issues**

During the research, no specific court rulings on the use of electronic contracts in cross-border trade between enterprises have been identified. However, it seems reasonable to assume that especially small and medium-sized enterprises are unaware of the specific legal status of electronic contracts agreed with trade partners from another Member State. This could be an obstacle to cross-border use of electronic contracts.

²¹ 80/934/EEC: Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980

²² 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters

²³ 16 September 1988 Convention on jurisdiction and the enforcement of judgments in civil and commercial matters

4. Electronic invoicing, payment and other matters related to execution of electronic contracts

4.1 National legislation and administrative practices

The obligation to pay for goods and services in B2B and B2C transactions does not differ from the obligation to pay in traditional off-line business relationships. Without any explicit notice is payment is due on delivery of the goods or service. General terms and conditions typically include payment periods of one week, one month or sometimes longer.

The Fair Trade Practices Act introduces a few rules protecting the consumer for hasty decisions and hasty payments. Article 38 states that the consumer only needs to pay some pre-defined services upon delivery of a receipt. Article 80 gives every consumer the right to withdraw during a period of seven days after delivery of the goods of the acceptance of the service contract (exceptions apply). The rules of the Trade Practices Act protection the consumer are of public order and cannot be overruled by contractual terms and conditions.

4.1.1 Electronic invoicing

Belgium has transposed the eInvoicing directive²⁴ through its Law of 28 January 2004 modifying the VAT Code²⁵ and the amendment of some existing executive Decrees.²⁶

The Belgian eInvoicing Act allows the issuance of electronic invoices under the **same basic conditions** as the ones imposed by the Directive. i.e. guaranteeing the origin and integrity of the invoice.²⁷ Belgium chose not to make use of the opportunity allowed by the Directive to make the requirements more stringent.

An electronic invoice is legally valid following Belgian legislation if it has been signed with an advanced electronic signature, or if it is has been transmitted by means of EDI. It is also possible for a company to ask the authorisation from the government to use any other methods of e-invoicing as long as the company can prove that the

²⁴ Directive 2001/115/EC amending Directive 77/388/EEC with a view to simplifying, modernising and harmonising the conditions laid down for invoicing in respect of value added tax; *Official Journal L 015*, 17/01/2002.

²⁵ Law of 28 January 2004 modifying the VAT Code (*Wet tot wijziging van het Wetboek van de belasting over de toegevoegde waarde / Loi modifiant le Code de la taxe sur la valeur ajoutée*, *Moniteur belge*, 10 February 2004). A consolidated version in the official languages can be found at <http://fisconet.fgov.be/>.

²⁶ Royal Decree n°1 of 29 December 1992, modified by the Royal Decree of 16 February 2004 (*Koninklijk besluit nr. 1 met betrekking tot de regeling voor de voldoening van de belasting over de toegevoegde waarde / Arrêté royal n° 1 relatif aux mesures tendant à assurer le paiement de la taxe sur la valeur ajoutée* *Moniteur*, 27 February 2004) and Royal Decree of 20th February 2004 (*Moniteur belge*, 27 February 2004) VAT Code and art. 1, §3 Royal Decree n°. 1

system guarantees the authenticity of the origin and the integrity of the contents.²⁸

As to the storage of the electronic invoices the following requirements should be respected:

- **Term of storage:** The invoice should be stored for 7 years, counting from the date of the invoice
- **Format of storage:** The electronic invoices should be kept in electronic form. Printing them out on paper and storing them is not allowed as valid storage.²⁹
- **Storage medium:** The storage medium is free. Invoices can be stored on a server, an optical disk, a magnetic medium, etc.
- **Storage of security measures:** The data used to guarantee the authenticity of origin and the integrity of the contents at issuance of the invoice (e.g. advanced electronic signature) should be stored together with the invoice and during the same period.
- **Secure storage:** The authenticity of origin, the integrity of the contents and the readability should remain guaranteed throughout the storage period of 7 years.³⁰
- **Location of storage:** The invoices should be stored on Belgian territory. The invoices can also be stored on the territory of an other EU member state, as long as the tax administration has been informed about the storage location prior to the storage activity and as long as the on-line access to and download of the invoices by the Belgian authorities is guaranteed.³¹

Means of payment and the obligation of the parties regarding the use of certain payment instruments

The European legal instruments relating to electronic money and electronic payments have all been transposed into Belgian legislation.

The Belgian law of 17 July 2002 regarding the transactions carried out by electronic payment instruments implements the EC Recommendation 97/489/EC concerning transactions by electronic payment instruments.³²

²⁸ Art. 1 §4 Royal Decree n°1. The authorisation is being given by the Minister of Finance.

²⁹ Art. 60 §3, 3d section VAT Code

³⁰ art. 60 VAT Code

³¹ Art. 60 §3, 1st section VAT Code

³² Wet betreffende de transacties uitgevoerd met instrumenten voor de elektronische overmaking van geldmiddelen- Loi relative aux opérations effectuées au moyen d'instruments de transfert électronique de fonds, MB 17 August 2002.

The directives 2000/28 and 2000/46 are transposed through the eMoney Act of 25 February 2003.³³

The EC Directive 2000/65 concerning the distance marketing of consumer financial services, which amends, *inter alia*, the Directive 97/7 on the protection of consumers in respect of distance contracts. The directive 2000/65 or Distance Marketing Directive - has been implemented by the act of 24 August 2005.³⁴

No major practical problems in relation to online payment have been reported. In spite of clear legislative protection, some consumers however still feel reluctant to use their payment card online due to fear of misuse.

4.1.2 *Delivery of the good or provision of services ordered electronically and withdrawal period*

The rights and obligations of contracting parties are set forth in the Belgian Civil Code. The Civil Code furthermore contains explicit rules with respect to the rights and obligations of the seller and the buyer for the delivery of goods.

In addition, the Belgian Consumer Protection Act³⁵, which implements European Directive 97/7/EC, contains specific rules for distance contracts and several other consumer protection obligations.

4.1.2.1 Non-performance of the obligation to deliver and late delivery

A seller of goods or service provider is required to deliver the goods (including all their accessories³⁶) and the services within the timeframe agreed between the parties. In case the parties have not agreed upon a specific timeframe, Belgian legal doctrine requires the seller to deliver the goods within a *reasonable* and/or *usual* timeframe, taking into account the type of goods / services and the information which was known (or should have been known) by the seller or service provider. In case of B2C distance contracts, the delivery timeframe will be 30 days, unless otherwise agreed³⁷.

In B2C contracts, it is furthermore explicitly forbidden to include a clause that allows the seller to unilaterally determine the delivery timeframe of goods or services³⁸.

³³ Wet tot wijziging van de wet van 22 maart 1993 op het statuut van en het toezicht op de kredietinstellingen - Loi modifiant la loi du 22 mars 1993 relative au statut et au contrôle des établissements de crédit, MB 7 March 2003.

³⁴ Wet tot omzetting van verschillende bepalingen van de richtlijn financiële diensten op afstand en van de richtlijn privacy elektronische communicatie — Loi visant à transposer certaines dispositions de la directive services financiers à distance et de la directive vie privée et communications électroniques, MB 31 August 2005.

³⁵ Act of 14 July 1991

³⁶ Article 1604 and 1615 of the Civil Code

³⁷ Article 81 §1 of the Consumer Protection Act

³⁸ Article 32, 4° Consumer Protection Act

In case the goods or services are not delivered or not delivered on time, the purchaser can demand either specific performance (from the other party or a third party) or termination of the contract. In both cases, the purchaser is also entitled to be compensated for any damages incurred. Furthermore, the purchaser can also delay his payment until the delivery has occurred, unless the parties have agreed otherwise³⁹.

Before specific performance, termination of the contract or damages can be requested from a court, the purchaser needs to send a notice to the other party. Parties can, however, contractually agree that no notice needs to be sent.

In some circumstances (e.g. when an intervention of the court would have become useless anyway), and provided due notice was sent, it is also accepted that specific performance or termination of the contract is executed without court intervention. It should also be noted that in B2C distance contracts, the Belgian Consumer Protection Act explicitly terminates the contract in case of non-performance of the seller or service provider⁴⁰.

4.1.2.2 Right of withdrawal from the contract in B2C transactions and return of the good

The right of withdrawal for contracts governed by Directive 97/7/EC on the protection of consumers in respect of distance contracts is at least 7 working days. In case the consumer was not properly informed about his right of withdrawal, this term is extended to three months⁴¹.

4.1.2.3 Delivery of a good not in conformity with the contract

The duty to deliver the goods also includes the obligation for a seller of goods to deliver the goods in conformity with the contract. Under Belgian law⁴², the acceptance by the buyer constitutes the acknowledgement that the product corresponds to its specifications and does not contain any visible defects. Nonetheless, the acceptance does not cover any hidden defects, i.e. defects which are hidden and make the goods unusable for their intended purpose (i.e. be defective).

In case of non-conformity of the goods or services, general Belgian contract law provides for similar actions (specific performance, termination and/or damages) as described above for non-delivery or late delivery. Claims based on hidden defects should be made within a short timeframe⁴³.

In B2C contracts several additional rights are provided to the consumer. In these contracts, it is not allowed to include a clause

³⁹ In B2C contracts, it is, however, not possible to agree otherwise: article 32, 8° Consumer Protection Act

⁴⁰ Article 81 §1 Consumer Protection Act

⁴¹ Article 80 §2 Consumer Protection Act

⁴² Articles 1641-1649 of the Belgian Civil Code

⁴³ Article 1648 Civil Code

which gives the right seller or service provider the right to unilaterally determine whether or not the goods or services are in conformity with the contract⁴⁴.

Moreover, in accordance with European Directive 1999/44/EC⁴⁵, the consumer shall (by his choice) be entitled in case of lack of conformity of the goods to either have the goods brought into conformity free of charge, have the goods replaced (delivery of substitute goods), or have an appropriate reduction made in the price or have the contract terminated. The consumer's rights as described above must be asserted within a 2-year period.

4.2 Cross border regulatory issues

Electronic invoices issued and sent by enterprises in other Member States are valid in Belgium as long as the basic principles of the eInvoicing directive as transposed in Belgian legislation have been respected.

Companies have been informed by their national financial institutions that pursuant to Regulation (EC) No 2560/2001, in order to get payment from customers from another Member State, the customer can order a cross-border electronic payment or a cross-border credit transfer up to 50.000 euro that will be charged by the financial institution in the same way as for domestic transactions.

No case law has been reported yet dealing with cross border electronic payments and electronic invoicing.

As to electronic invoices, one of the reasons for the lack of relevant case law may be that it is too early. Companies are only now implementing electronic invoicing systems and testing the systems and procedures out on a cross-border scale. Due to the diverging national transpositions of the Electronic Invoicing directive, it may be expected that sooner or later tax litigation cases will be opened relating to the legal value of an electronic invoice used for cross-border transactions.

As to electronic payments, the same assumption can be made. It is only at this very moment that banks are implementing the procedures for performing cross border electronic payments taking into account the national rules transposing the European legal framework. However, disputes on the wrongful use of IBAN codes, etc. can be expected in the near future.

⁴⁴ Article 32, 5° Consumer Protection Act

⁴⁵ implemented in articles 1649bis - 1649octies Civil Code

5. General assessment of national legislation and administrative practices in the fields of e-signatures, e-contracts and e-invoicing

5.1 Main legal and administrative barriers to e-business

During the last five years, the Belgian legislator has been very active in identifying and removing legal and administrative barriers in the fields of e-signatures, e-contracts and e-invoicing.

Still, barriers remain to exist due to (1) the lack of awareness, (2) the lack of user friendly and interoperable products and (3) the historic tradition to put more trust in paper.

1. Indeed, although the legal framework may be ready for conducting eBusiness in a legally compliant way, enterprises need to be made aware about the opportunities the legal framework offers.
2. Moreover, user friendly software and hardware that is also interoperable is still in its infancy. It is not easy as a non-technical person to append an electronic signature to an electronic document knowing that the signature is containing all elements for becoming a legally accepted signature.
3. Finally, for companies to shift from a paper environment to an electronic environment, it needs time. After having worked for so many years in a comfort zone of paper, it takes courage for companies to leave the paper environment and shift to an electronic one adapting to new procedures and technologies.

As mentioned before, the introduction of the electronic identity card (eID), including electronic signature and secure log on functionality could be the killer application triggering those three impeding factors:

1. Awareness: the eID related initiatives are frequently covered by the press and discussed on public events such as conferences and seminars.
2. User friendliness: product developers are on a daily basis launching new more user friendly products and services that are making use of the eID, taking into account interoperability standards.
3. Advance: companies and citizens are leaving their traditional documentation and communication methods behind because they are gently forced to make use of the eID applications (such as electronic VAT declaration, electronic tax declaration, electronic public procurement, electronic invoicing, etc).

5.2 Awareness about national authorities in charge of solving legal problems in e-business

To our knowledge, no contact points pursuant to Art. 19(4) of Directive 2000/31/EC have been formally established in Belgium. The Ministry of Economic Affairs has set up the so-called "Internet Rights Observatory".⁴⁶ The main tasks of this Observatory is to submit opinions on the economic problems brought about by the use of new information and communication technologies; to organise consultation among the economic actors concerned; and to inform and sensitise the public on these aspects. The Internet Rights Observatory is composed of persons with an experience in new technologies but also of representatives of the economic actors and representatives of ICT users.

As to the enforcement of consumer protection laws pursuant to Arts. 4 and 5 of the Regulation on consumer protection cooperation, no competent authorities have been designated yet.

Interesting to note is that Belgium is member of the International Consumer Protection and Enforcement Network (ICPEN), formerly known as the International Marketing Supervision Network (IMSN). ICPEN is a membership organization consisting of the trade practices law enforcement authorities of more than two dozen countries, most of which are members of the Organization for Economic Cooperation and Development (OECD). The mandate of the Network is to share information about cross-border commercial activities that may affect consumer interests, and to encourage international cooperation among law enforcement agencies.⁴⁷

5.3 Legal and administrative best practices in e-business

In Belgium, the following initiatives can be regarded as main legal and administrative encouraging factors to the development of electronic signature, electronic contract conclusion and electronic invoicing and payment.

1. Information Society Control Team

The public administration has set up two teams devoted to controlling the consumer protection, data protection and e-commerce related rules on Belgian websites or websites directed to Belgian consumers.⁴⁸

A complaint service has been put in place that can be contacted through e-mail, fax, phone or postal mail.

2. Fedict

Belgium has a ministry dedicated to the use of information technology. This public department is very active in promoting the

⁴⁶ <http://www.internet-observatory.be/>

⁴⁷ <http://www.icpen.org/>

⁴⁸ http://www.mineco.fgov.be/information_society/e-commerce/internet_watch/home_nl.htm

use of information technology and e-business by taking legal and practical initiatives.⁴⁹

Some of their initiatives are the introduction of the electronic identity card, and the launch of a "PC for all"-programme (tax deduction for ICT package).

4. Belgian direct marketing association

The Belgian direct marketing association is promoting a legally compliant direct marketing through electronic communication channels. To this end, they developed legal guidelines, a spam box and a privacy policy generator.⁵⁰

5. eInvoicing working group

Industry players together with the public administration are gathered in an informal working group discussing the requirements for legally valid electronic invoicing and eInvoice archiving. The results of the discussion will be distilled into a so-called Ministerial Circulaire (administrative regulation) that to be expected end 2006.

6. Internet Rights Observatory

The Ministry of Economic Affairs has set up the so-called "Internet Rights Observatory".⁵¹ See above (5.2) for further information.

7. Office for Administrative simplification

The Belgian government has an office for administrative simplification. This office has taken many legal and practical initiatives for abolishing burdensome administrative rules.⁵² Many of the initiatives related to the introduction of paperless transactions by making minor changes to old laws.

Some examples are the possibility of electronic storage of evidence documents in hospitals, on-line consultation of holiday files, electronic registration of vehicles, electronic declaration for the compensation of breast feeding pauses, online calculation of holiday pay, electronic declaration occasional labour in agriculture and horticulture, electronic annual corporation tax return, electronic deposition of annual accounts, etc.

⁴⁹ www.fedict.be

⁵⁰ <http://www.bdma.be/>

⁵¹ <http://www.internet-observatory.be/>

⁵² www.kafka.be

ANNEX 1: E-business national legislation

Laws:

- Wet tot invoering van het gebruik van telecommunicatiemiddelen en van de elektronische handtekening in de gerechtelijke en de buitengerechtelijke procedure - Loi introduisant l'utilisation de moyens de télécommunication et de la signature électronique dans la procédure judiciaire et extrajudiciaire.
- Wet houdende vaststelling van bepaalde regels in verband met het juridisch kader voor elektronische handtekeningen en certificatie-diensten - Loi fixant certaines règles relatives au cadre juridique pour les signatures électroniques et les services de certification.
- Koninklijk besluit houdende organisatie van de controle en de accreditatie van de certificatie-dienstverleners die gekwalificeerde certificaten afleveren - Arrêté royal organisant le contrôle et l'accréditation des prestataires de service de certification qui délivrent des certificats qualifiés.
- Wet betreffende de handelspraktijken en de voorlichting en bescherming van de consument - Loi sur les pratiques du commerce et sur l'information et la protection du consommateur, M.B., 29 August 1991, err., M.B., 10 October 1991.
- Wet betreffende de bescherming van de consumenten bij verkoop van consumptiegoederen - Loi relative à la protection des consommateurs en cas de vente de biens de consommation M.B., 21 September 2004.
- Koninklijk besluit tot wijziging van het koninklijk besluit van 30 juni 1996 betreffende de prijsaanduiding van producten en diensten en op de bestelbon, M.B. 22 February 2000.
- Loi sur certains aspects juridiques des services de la société de l'information visés à l'article 77 de la Constitution - Wet betreffende bepaalde juridische aspecten van de diensten van de informatiemaatschappij als bedoeld in artikel 77 van de Grondwet, MB 17 March 2003.
- Loi sur certains aspects juridiques des services de la société de l'information - Wet betreffende bepaalde juridische aspecten van de diensten van de informatiemaatschappij, MB 17 March 2003.
- Koninklijk besluit van 18 februari 2004 tot wijziging, wat het toegangsverbod tot bepaalde opdrachten en het invoeren van elektronische middelen betreft, van een aantal koninklijke

besluiten genomen ter uitvoering van de wet van 24 december 1993 betreffende de overheidsopdrachten en sommige opdrachten voor aanneming van werken, leveringen en diensten - Arrêté royal modifiant, en ce qui concerne l'interdiction d'accès à certains marchés et l'introduction de moyens électroniques, un certain nombre d'arrêtés royaux pris en exécution de la loi du 24 décembre 1993 relative aux marchés publics et à certains marchés de travaux, de fournitures et services, MB 27 February 2004.

- Law of 28 January 2004 modifying the VAT Code (*Wet tot wijziging van het Wetboek van de belasting over de toegevoegde waarde / Loi modifiant le Code de la taxe sur la valeur ajoutée, Moniteur belge, 10 February 2004*).
- Royal Decree n°1 of 29 December 1992, modified by the Royal Decree of 16 February 2004 (*Koninklijk besluit nr. 1 met betrekking tot de regeling voor de voldoening van de belasting over de toegevoegde waarde / Arrêté royal n° 1 relatif aux mesures tendant à assurer le paiement de la taxe sur la valeur ajoutée Moniteur, 27 February 2004*) and Royal Decree of 20th February 2004 (*Moniteur belge, 27 February 2004*)
- Wet betreffende de transacties uitgevoerd met instrumenten voor de elektronische overmaking van geldmiddelen- Loi relative aux opérations effectuées au moyen d'instruments de transfert électronique de fonds, MB 17 August 2002.
- Wet tot wijziging van de wet van 22 maart 1993 op het statuut van en het toezicht op de kredietinstellingen - Loi modifiant la loi du 22 mars 1993 relative au statut et au contrôle des établissements de credit, MB 7 March 2003.
- Wet tot omzetting van verschillende bepalingen van de richtlijn financiële diensten op afstand en van de richtlijn privacy elektronische communicatie — Loi visant à transposer certaines dispositions de la directive services financiers à distance et de la directive vie privée et communications électroniques, MB 31 August 2005.

Doctrine:

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