



WESTFÄLISCHE WILHELMS-UNIVERSITÄT  
Institut für Informations-, Telekommunikations- und Medienrecht (ITM)  
- Zivilrechtliche Abteilung -  
Prof. Dr. Thomas Hoeren

**Electronic Commerce, Electronic Contracts and the Law: Beijing September 2006**

电子商务、电子合同及其法律：2006年9月北京

The current EU regulatory framework for e-commerce and electronic contracts in particular mainly consists of three directives:

目前欧盟电子商务和电子合同的规则框架主要由三个指令组成：

1. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('**Directive on electronic commerce**')  
2000年6月8日欧洲议会及委员会 2000/31/EC 关于信息社会服务特别是国内市场电子商务的若干法律问题的指令（“电子商务指令”）
2. Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for **electronic signatures**  
**1999年12月13日**欧洲议会及委员会 1999/93/EC 关于电子签名共同法律框架的指令
3. Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of **distance contracts**  
**1997年5月20日**欧洲议会及委员会 97/7/EC 关于远程合同消费者保护的指令

Directives do not have a direct effect on the EU member states. Each EU-directive allows the member states a certain period in which the member states have to convert the directive into national law. As an effect, national laws in one member state could be not identical with laws of another member state, although both base on the same EU-directive. Nevertheless national laws must not be contradictory to EU-directives and every authority, administration or court has to use national laws in accordance to the EU-directives. The result is: if you want to learn

about the regulatory framework for electronic contracts in the EU, it is sufficient to give expert advice about the EU-directives.

指令对欧盟成员国不直接发生效力。每一欧盟指令允许成员国在一定期限内将指令转化为国内法。因而，不同成员国的国内法虽然依据的是同一欧盟指令，却并不完全一致。然而国内法必须不能够与欧盟指令相矛盾，每一机构、行政部门或法院均应适用与欧盟指令相符的国内法。结果即是：如果你想学习欧盟的电子合同规则框架，则对欧盟指令给出专家意见已足够。

The EU regulatory framework e-commerce, similar to general commerce, needs to tackle a lot of questions that arise in business relations. Among others these may concern judicial ones like refutations, lacks of wills, guarantees or rules according to the burden of proof. Or it may concern practical questions like means of payment, transactions or taxes.

欧盟规则框架中的电子商务与一般商务类似，有许多由商业关系引发的问题需要解决。这可能涉及司法问题如辩驳、意思欠缺、保证、举证责任规则。或者它可能涉及实际操作问题如支付手段、交易处理或税收。

**Payment:** To begin with the more practical ones, an essential question is: How can I pay the goods I have ordered? It is possible to pay with “normal” means like credit card, bank transfer or by bill. But presently some companies are trying, based on the “directive on the taking up, pursuit of and prudential supervision of the business of electronic money institutions”<sup>1</sup>, to establish some kind of electronic money. Examples are CyberCoin<sup>2</sup> or PayPal<sup>3</sup>. Except for the latter which gained publicity due to eBay<sup>4</sup> the usage is not very common.<sup>5</sup>

支付：从更实际的问题开始，一个基本问题是：我定购的货物该如何付款？有可能使用“常规”支付手段如信用卡、银行汇款或票据。但目前一些公司在尝试着以关于从事、经营和审慎监管电子货币业务的指令为依据，设立某种电子货币。此类例子如 CyberCoin 和 PayPal。除后者由于 eBay 获得一定知名度外，使用并不普遍。

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<sup>1</sup> Directive 2000/46/EC

<sup>2</sup> [www.cybercash.com](http://www.cybercash.com)

<sup>3</sup> [www.paypal.com](http://www.paypal.com)

<sup>4</sup> [www.paypal.com](http://www.paypal.com) – Help Center – About PayPal

<sup>5</sup> Hoeren – Skript Internetrecht, p. 284f - <http://www.uni-muenster.de/Jura.itm/hoeren/>

Leonardo-Campus 9, D-48149 Münster,

Tel.: 02 51/83-3 86 00, Fax: 02 51/83-3 86 01, Email:[hoeren@uni-muenster.de](mailto:hoeren@uni-muenster.de) 20. September 2006

**Taxation:** Another issue connected to eContracts is the taxation of these. Since in Europe there is no common tax system and since eContracts do not pay any attention to national borders the question of the taxation of cross border contracts is very important. Within the EU the Value Added Tax (VAT) rules for mail orders apply to eContracts if goods are sold and delivered. According to these rules the location of the server decides which amount of tax is to pay. The real problem occurs if there is a non EU State implicated in the contract because in that case no taxes are collected or if there is no delivery of goods like the download of games or music.<sup>6</sup> As a basic principle of the EU VAT system was that the existing tax law is sufficient for eCommerce, the taxation follows the common rules.<sup>7</sup> So, these electronically delivered services originated in the EU were always subject to the VAT irrespective of the place of consumption. On the other hand it also implied that data originating from a server outside the EU was not weighed down with taxes. After the identification of this problem the EU issued an amending directive regarding the value added tax arrangements applicable to radio and television broadcasting services and certain electronically supplied services.<sup>8</sup> Now the services shall be taxed at the recipient's place of the services.<sup>9</sup> This comprehends that services which are not intended to be put onto the European Market still will not be taxed.<sup>10</sup> So there remains a problem to be solved.

税收：另一个与电子合同相关的问题是税收。由于在欧洲没有共同的税收制度以及电子合同的无国界性，跨界电子合同的税收问题显得尤为重要。在欧盟内部，如果电子合同存在货物买卖并交付，则可以适用邮购的增值税惯例。依照该惯例，服务商的位置决定征税额度。真正的难题是，合同中包含非欧盟国家——因为这时没有征税，或者不存在货物交付——如下载游戏或音乐的情形。欧盟增值税制度的基本原则是，现有税收法对电子商务已足够，税收应遵循普通规则。因此，电子交付的服务如果源于欧盟，通常要交增值税，而不管消费地点在哪里。但另一方面，这也包含了数据源于欧盟外的服务商则不受税收负担。认识到这一问题之后，欧盟发布了一项关于广播、电视服务及某些电子服务适用的增值税安排的修正指令。现在，服务应在服务的接受者所在地征税。这意味着并非面向欧洲市场的服务仍然不被征税。因而此处仍存在一个悬而未决的问题。

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<sup>6</sup> <http://www.internetpolicy.net/e-commerce/dontpanic.pdf> S.63

<sup>7</sup> <http://www.internetpolicy.net/e-commerce/dontpanic.pdf> S. 64

<sup>8</sup> Directive 2002/38/EC

<sup>9</sup> Directive 2002/38/EC (3)

<sup>10</sup> <http://www.internetpolicy.net/e-commerce/dontpanic.pdf> S. 64

**Authentication:** Regarding the problem of the probative force of electronic documents, the Electronic Signature Directive tries to unify certain standards so that the users can trust into those documents. Unfortunately the Electronic Signature Directive can not solve the problem of the probative force in total. For example, how can you prevent someone avoiding a contract by claiming that he never sent the message, or that someone else pretended to be him?<sup>11</sup> So you need an electronic signature that is equal to a handwritten one but this process is very complicated. Firstly one has to acquire a signature key. Therefore it is necessary to file a relevant application with a certification service provider and a reliable identification of the applicant is needed. After that the future signature ordinance must contain: the name of the signature key holder or pseudonym, allocated to him, the allocated signature key, the specification of the algorithms necessary for use, the sequential number of the certificate, commencement and end of the validity, the name and state of origin of the certification service provider and finally the statement that it is a qualified signature.<sup>12</sup> After having fulfilled all those requirements it still remains uncertain in which way the judge will consider the electronic document.<sup>13</sup>

证明：关于电子文件证明力问题，电子签名指令试图确立用户可以相信的文件的统一标准。然而电子签名指令无法一次性解决证明力问题。例如，你该如何阻止某人声称他从未发送过信息或其他人冒充他而要求合同无效？因此，你需要与手书签名等同的电子签名，但这个过程十分复杂。首先，必须获得签名密钥。因而，必须向证明服务提供商提交相关申请，以及申请真实性的可靠证明。然后，签名令将包括：分配给签名密钥持有人的名称或代称、分配的签名密钥、使用规则说明、证书的序列号、有效期、证明服务提供商的名称和所属国，最后声明这是符合要求的签名。即便在满足以上所有要求之后，法官将如何看待该电子文件仍存在不确定性。

**Overarching Issues:** The broader e-commerce regulation concerns issues that can not be limited by borders as for example the work “inside” the internet. To ensure that there is no obstacle for any user of the internet, who wants to participate in that work, conditions of access have to be equalized. So the current EU regulatory framework tries to ensure the unification of certain standards. So on the one hand the E-Commerce Directive deals with subjects relating to eContracts such as the conclusion of contracts. On the other hand it

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<sup>11</sup> <http://www.internetpolicy.net/e-commerce/>

<sup>12</sup> e-commerce law in Europe and the USA p.173, Spindler, Björner, Berlin 2002

<sup>13</sup> Hoeren – Skript Internetrecht, p.267 - <http://www.uni-muenster.de/Jura.itm/hoeren/>

Leonardo-Campus 9, D-48149 Münster,

Tel.: 02 51/83-3 86 00, Fax: 02 51/83-3 86 01, Email:[hoeren@uni-muenster.de](mailto:hoeren@uni-muenster.de) 20. September 2006

considers several points which are connected to eCommerce in a more general way like the principle of country of origin and the involved prohibition of restrictions.

范围问题：更为广泛的电子商务规则涉及的问题并不局限于国界之内，如在互联网“中”的工作。为了保证不为任何想参与这个工作的互联网使用者设置障碍，进入的条件必须是等同的。因此目前欧盟的制度框架尽可能保证有关标准的一致性。一方面，电子商务指令处理与电子合同相关的问题如合同的缔结。另一方面，它在更广泛的范围内考虑与电子商务相关的几个要点，如来源国规则及限制的禁止。

**Bridge between e- and non-e-commerce:** As eCommerce is related to several other issues concerning the delivery of goods, complaints or intellectual property rights several other not e-commerce specific directives are applicable to e-commerce. For instance the Consumer Credit Directive which protects consumers when they use contracts about credits, financing or rate delivery. Others are the “directive on unfair terms in consumer contracts”, “the directive on certain aspects of the sale of consumer goods and associated guarantees” and the “directive concerning the distance marketing of consumer financial services” which are applicable to e-commerce, too.

电子商务与非电子商务之间的过渡：由于电子商务涉及关于货物交付、控告或知识产权的若干其他问题，几个非特别针对电子商务的指令也适用于电子商务。如旨在保护使用信贷、融资或分期付款的消费者的消费者信用指令。其他同样适用于电子商务的指令是“关于消费者合同不平等条件的指令”、“关于生活消费品买卖及其担保义务若干问题的指令”和“关于异地的消费者金融服务指令”。

**Implementation:** The use of directives on the other hand creates some difficulties, too. Since the legal systems in the EU remain different, the private international law has to determine the rules adaptable to arising issues. Article 3 I and II E-Commerce Directive concern the country of origin principle, but it is not absolutely clear if this is a rule of the private international law.<sup>14</sup> Although Art 1 IV ECD is contradicting an interpretation in this direction one can understand this regulation as a private international law rule. Against this background the majority view is that the country of origin principle refers to material aspects of law.<sup>15</sup> As a conclusion of this, the law of that country would be applicable, where the provider of the

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<sup>14</sup> RIW 2002, p. 191

<sup>15</sup> RIW 2002, p. 192

services established his office. Others understand this regulation as a referral to the principle of benignity. This would mean that the material law from his country of origin only applies if it is the most advantageous.

实施：指令的运用同时也带来了一些困难。由于欧盟内法律制度仍然不同，必须由国际私法决定出现的问题应适用的规则。电子商务指令第 3 条 I 和 II 款涉及到来源国规则，但并不完全清楚这是否是一条国际私法规则。尽管电子商务指令第 1 条 IV 款同该指令中的解释相矛盾，我们仍可将该规则理解为国际私法规则。与此相反，大多数观点则认为来源国规则指实体法方面。其结论即，将适用服务提供商设有办事处的国家的法律。另一些人则将该规则理解为优先选择适用的利益保护规则。这意味着，来源国的实体法只有在是最有利时才适用。

Another interpretation is the exegesis as a collective referral, including the private international law of the country of origin.<sup>16</sup>

还有一种解释是，整体选择来源国的法律，包括来源国国际私法。

To sum up, one can say that the regulatory framework is interlaced very well into a net of other different directives. Although there are some problems that are not already solved finally by the EU regulatory framework like the probative force of electronic documents, electronic money or the taxation of international online services, several problems like E-Procurement, general terms and conditions or means of payment are already in solution.

总之，可以说规则框架与其他各指令交织成一个网。尽管还有一些问题没有为欧盟规则框架所最后解决，如电子文件证明力、电子货币及国际在线服务的税收问题等，但像电子采购、一般条款及支付的条件或方式等问题已经得到解决。

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<sup>16</sup> RIW 2002, p. 192

## Further steps:

### 更多未来措施:

- With the growing importance of electronic commerce, regulatory challenges also grew in size. Aspects like identity theft, unsolicited mail (*spam*), infringement of privacy, malware (dialers), phishing, hacking or general online fraud require new approaches.
- 电子商务的重要性日益凸现，对制度的挑战也愈来愈彰显。如身份盗用，垃圾邮件，侵犯隐私权，探测、锁定、攻击，或一般在线欺诈等问题都需要新的解决方法。
- To deal with the problems related to growing importance of electronic commerce, the EU induced the “E-Confidence-Initiative” in May 2000. In order to this, the Organisation for Economic Co-operation and Development (OECD) released guidelines in 1999 and 2003 how to handle e-commerce, how to judge reliable platforms, etc. Companies could be labelled for quality and reliability by a certification system developed with the input of consumer organisations and industry representatives at international level leading to a wide use and acceptance for these labels.
- 为了解决电子商务发展带来的问题，欧盟于 2000 年 5 月达成“电子信心倡议书”。经济合作与发展组织为此就如何处理电子商务、如何评判可靠的平台等问题发布了 1999 年与 2003 年指导方针。公司的品质和信用度可由一个认证系统分别予以标记，该系统由国际范围内的消费者组织和行业代表输入，并使这种标记被广泛使用与接受。
- The On-line Dispute Resolution shall help those who became victim to malicious or negligent e-commerce in a quicker and cheaper way than courts. If confidence in E-commerce is to expand, consumers need speedy access to justice.
- 在线争议解决机制将采用比法庭诉讼更为迅速、便宜的方法帮助电子商务中的恶意或过失的受害者。如果对电子商务的信心增长，则消费者更加需要公平正义。

- The security of payments shall be raised by the adoption of the electronic signature Directive on the one hand, at the same time on the other hand the awareness of, the technological support for shall be raised, e.g. by the duty of the business-seller to give the customer a chance to check his order for mistakes, etc., and point the customer's attention to that possibility.
- 一方面，支付的安全性由于电子签名指令的运用而得到加强，另一方面，知悉权和技术支持也应同时得到加强，如交易卖方应有义务给予消费者核查订单错误等的机会，并予以提示等。
- At last the data privacy shall be protected better. Safe payment systems should be developed. Uncertainties regarding the insecurity of payment could be solved by secure or reliable new payment systems, that are widely accepted and relied upon, such as PayPal with 58 million registered users from 56 countries and covering even „micro payments“ with such small amounts, causing more costs than the amount transferred. Yet still the highest priority must be assigned to data protection.
- 最后，应更好地保护数据的秘密性。应开发安全的付款机制。关于付款不安全的疑虑可由安全可靠、并被广泛接受和信赖的新付款机制来消除，如拥有来自 56 个国家的五千八百万注册用户，覆盖成本大于交易额的极小额“微小支付”的 PayPal。然而，数据保护仍应当是重中之重。
- There is also consideration to establish an EU Research Institute for Consumer Affairs.
- 考虑专为消费者事务建立一个欧盟的研究机构。
- Another foreseen mean is to develop the „System for Rapid Exchange of Information“ (“RAPEX”) for competent nominated authorities to swiftly exchange information and communicate urgent warnings and a soundly-structured national enforcement system staffed by well-trained, competent authorities belonging to a single rather than multiple ineffective administrative organisation.
- 另一个可预见的措施是为指定的权力机构提供“快速信息交换系统”以使其可以迅速交换信息、传达紧急警告等，及建立一个由经过良好训练的独立的主管当局而非低效率的行政组织所掌管的组织严密的全国执行系统。
- Feedback from enterprises on concrete examples of unfair practices in B2B e-markets will be encouraged, being collected through existing business networks, such as



European e-Business Legal Portal, the European B2B e-marketplaces portal and the national e-commerce contact points.

- 通过现有的商业网络如欧洲电子交易法律门户、欧洲 B2B 电子市场门户和国家电子商务合同要览等搜集并鼓励企业反馈关于 B2B 电子市场不公平情况的具体事例。
- To raise the consumers' trust in e-commerce, a constructive dialogue between consumers and manufacturers and distributors should be supported, including the consultation of consumer organisations to create a climate of confidence.
- 为提高消费者对电子商务的信任度，支持在消费者与厂商和分销商之间进行建设性对话，包括消费者组织为提高信心所进行的磋商。
- As further steps general projects shall reveal their results by September 2006 and a legal conference shall take place 27 and 28 November 2006 validating the results for B2B issues. A study on the economic impact on B2B e-markets on competitiveness and productivity shall be initiated.
- 作为未来的措施之一部，到 2006 年 9 月一般项目会有结果，2006 年 11 月 27 至 28 日将召开一个法律会议，以确认 B2B 问题的结果。另外，将开始一项关于 B2B 电子市场对竞争和生产力的经济影响的研究。