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# Electronic Invoicing: More than Just VAT Aspects

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## Abstract

European legislation facilitates that companies start using electronic invoicing. The aim of the European E-invoice Directive was to introduce some uniform rules regarding VAT throughout the European Union. Some other important legal aspects, such as the probative value of an e-invoice, endorsement, e-invoices in bankruptcy proceedings, remain often unexamined. EU Member State law can be construed and interpreted according to the European Directives, for legal issues not covered by the E-invoice Directive. When the security issues are covered, such as the authenticity of the origin and the integrity of the contents (i.e. essential requirements of the E-invoice Directive), so that can be assured that the invoice remains unchanged and readable, e-invoices and paper invoices should have the same legal value.

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## Introduction

A lot of legal doctrine has already been published about the VAT aspects of e-invoices, because the European Directive introducing the e-invoice is VAT related. In this short paper we will examine some other aspects: an e-invoice should have the same legal value as its paper counterpart. We look for arguments in national law (of a civil law country) and in European law to substantiate this examination, taking into account on the one hand the absence of relevant case law and the untested nature of an e-invoice, and on the other hand the fact that the national law should be interpreted according to the European Directives. Starting point is that companies using e-invoices should be able to benefit from a complete equality between paper and electronic invoices. We will discuss: (i) the probative value of an e-invoice (what happens in court when one claims on the basis of an e-invoice?), (ii) endorsement (e.g. factoring) of e-invoices (iii) and e-invoice in legal proceedings of bankruptcy and sequestration of goods

## 1. European legislation

Two major initiatives on the European level should be examined.

## 1.1. Electronic Commerce Directive [2]

First, the Electronic Commerce Directive, which provides in article 9 :

?Member States shall ensure that their legal system allows contracts to be concluded by electronic means. Member States shall in particular ensure that the legal requirements applicable to the contractual process neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of their having been made by electronic means.?

This article concerns all aspects of contracts concluded by electronic means, including the invoicing related to the services rendered or work delivered purporting the contract[3]

## 1.2. E-invoice Directive [4]

The second relevant European initiative in this context is the E-invoice Directive. This Directive goes beyond mere tax issues and outlines some important principles about e-invoicing:

1.It imposes on the Member States the obligation to set up a framework permitting the use of e-invoices without any prior authorization (e.g. by the VAT administration)

2.E-invoices can only be used when the receiver accepts the principle of using e-invoices

3.The authenticity of the origin and the integrity of contents must be safeguarded by means of either an advanced electronic signature as defined in the E-Signature Directive [5] or by EDI.

The following items will be discussed regarding the E-invoice Directive : (1) obligation to issue invoices; (2) contents of the invoice; (3) conditions for e-invoicing and (4) archiving of e-invoices

(1) obligation to issue invoices

The cornerstone of the E-invoicing Directive is the obligation to issue an invoice for VAT-reasons (VAT rate and regime; possibility for control for the authorities; exercise deduction right of VAT). The situations in which one has to send an invoice, remain unaltered. Contrary to the sixth VAT-Directive, to which the E-invoice Directive is an amendment, the E-invoice Directive contains specific provisions regarding self-billing and outsourcing of invoicing, which have both become a usual practice in business life.

(2) contents of the invoice

The obligatory mentions of the invoice, as described in the Directive, are only relevant for VAT-purposes. In other words : other obligatory mentions, for other than VAT-reasons, remain allowed. Since the Directive aims at a harmonization it lists ten obligatory mentions.

(3) conditions for e-invoicing

The authenticity of the origin and the integrity of contents must be safeguarded by means of either an advanced electronic signature or by EDI. The advanced electronic signature may be appended with a qualified certificate and created with a secure signature creation device, but this is not an obligation. Member States may opt for this when implementing the E-invoice Directive. The consequence is that the electronic signature would automatically be equivalent to a handwritten signature. The legal implications and discussions about this issue are out of scope of this paper[6]

(4) archiving of e-invoices

The archiving obligations for e-invoices are the same as for paper invoices. Archiving by electronic means is allowed (hard disk, CD WORM). At all times, access to the contents of the e-invoice has to remain possible during a certain period of time, which is to be determined by the Member States. The

archiving[7] has to be such that the contents cannot be altered (authenticity and integrity). They must remain readable.

## 2. National (Belgian) legislation

### 2.1. One of the basic principles: distinction between ?original? and ?copy?

Can a distinction be made between the ?original? and a ?copy? of an e-invoice? This question could be relevant in the law of proof. Also, the issue whether an invoice is an original or a copy can be relevant in cases of technical problems related to the e-invoice (hardware/software) or in cases a customer wishes an electronic and a paper version simultaneously (for e.g. technical reasons).

Traditionally, a document with a signature is considered as an ?original?. All reproductions; which do not bear a signature, are considered as mere ?copies?. Following to some legal doctrine [8], an electronic document is to be considered as a written piece ("?rit"/"geschrift") if it is (i) readable, (ii) not capable of deterioration, (iii) stable and (iv) allows the identification of the sender. The question whether the written piece is an original or a copy depends on whether a signature is appended to it or not.

Consequently, if e-invoices are sent through a system that appends an advanced electronic signature to them, this means that each reproduction of the electronic file containing the e-invoice could be considered as an ?original?. All reproductions (paper or electronic) without signature appended to it, would ? according to the same reasoning ? be considered as a mere ?copy?. However, in the electronic world the original e-invoice and the copy will have the same probative value: both of them will benefit from a presumption of proof.

### 2.2. Proof against a merchant

As the proof against a non-merchant is free, a judge should admit an accepted e-invoice as proof of an obligation against a merchant.

A creditor must first prove the debtor?s knowledge of the said e-invoice. In other words : did he receive the invoice ? It could be argued before the judge that the acknowledgement of receipt generated by the system transporting the e-invoice could serve as proof of receipt and knowledge of the e-invoice by the debtor. An extra argument would be available when both debtor and creditor have agreed on the means of proof, either bilaterally or by means of adherence to a group of users who are all bound by the same type of contract.

The accepted e-invoice has the value of a presumption of proof, even when it is signed with an electronic signature. It is not considered as a signed act because only the creditor has signed the e-invoice and not debtor. The debtor can still attempt to counter this proof by producing another presumption or a handwritten and signed act.

### 2.3. Proof against a non-merchant

Here also, there are strong arguments to argue that an acknowledgement of receipt should be accepted as proof of receipt by a judge. Such acknowledgement of receipt is indeed the proof of a fact, which can be proven by all means of evidence.

A judge shall not accept an e-invoice as proof of an obligation in excess of more that 375 EUR against a non-merchant, on the basis of a mere e-invoice. He will not do this on the mere basis that the invoice is electronic (this would be an infraction on the E-signature Directive) but because such proof can only be delivered by a written and signed act. An e-invoice shall not be considered as such a written and signed act in the absence of the debtor?s signature on it.

### 3. Endorsement of e- invoice

The 'endorsement' of an invoice is a special procedure, created in order to facilitate the classical transfer of receivables as regulated by the Civil Code. It is regulated by a specific Act of 25 October 1919. A typical use would be the transfer of a receivable, incorporated in an invoice, to a factoring company. The procedure may be used for the pledging of invoices as well (not discussed in this paper).

The endorsement was introduced in order to facilitate the granting of credit in a commercial context, because the classical transfer of receivables under the Civil Code was a difficult and heavy procedure (until 1994). The conditions for endorsement are laid down in article 13 of the Act of 1919 : every receivable resulting from a professional, commercial or civil activity, which is usually incorporated in an invoice, may be transferred or pledged by endorsement of this invoice or a copy thereof that is certified as conform. Endorsement can only be done to a credit company. It can only be done once, not successively (art. 15). The invoice must have several obligatory mentions: the date, the identity of the creditor, the debtor, the price of every delivery or service, and the global amount of the receivable. It must not be signed. The invoice must not have been accepted in order to be available for endorsement (e.g. one can endorse even before sending the invoice).

The certified copy is regarded as equivalent to the invoice itself (art. 13). This means that the formalities necessary for endorsement can be fulfilled on a certified copy. Of course this copy must be complete and it must contain all the elements mentioned on the original. It must also be certified as being conform to the original. E.g. a seller, who has not got an original invoice anymore, can use the certified copy for the endorsement.

The endorsement must mention the name of the 'transferee'. It must be dated and signed by the transferring creditor and, if it concerns a pledge, mention explicitly that it is an endorsement for a pledge. If these formalities are not fulfilled, the endorsement can be null and void.

The endorsement of the invoice must be notified to the debtor by a 'written notification' of endorsement. This notification has to mention that the debtor can, as from the moment of receipt, only pay his debt to the new creditor.

How could the endorsement be applied to e-invoices?[9]

Either the endorsement is made on the electronic version of the invoice, or on a certified paper copy. In case of the certified copy of the invoice, which can be a printout of the e-invoice that is certified as 'conform', all necessary mentions are handwritten on the paper a printout of the e-invoice.

In case the endorsement is applied to the original e-invoice, i.e. the electronic version, the mentions and signature will have to be electronic. Is this satisfying the requirement of the law of 1919 ? It does not expressly require a handwritten signature, only that the endorsement be 'signed'. Given an interpretation of the legislation in conformity with the Directive Electronic Commerce as described above, it can be advocated that the digital signature must be accepted when the term 'signed' is interpreted. A contra-argument could be that the digital signature, as introduced in Belgian law, would only be applicable within the Civil Code and not in specific legislation.

As mentioned before, the endorsement was initially created in order to facilitate the transfer or pledge of the receivables contained in an invoice, because the common rules in the Civil Code were burdensome. This has changed since 1994. There is a new art. 1690 of the Civil Code. It is not longer necessary to send the notification to the debtor by a registered letter or a writ of a bailiff. The form of the notification is free. The jurisprudence and the legal doctrine confirmed that this notification must not be done in writing: it is sufficient that it would be done by electronic means, if it may result in a document on a paper support. However, the notification should be express and formal. According to the current jurisprudence and legal doctrine electronic means of communication, which are able to produce a paper, can be used as a notification[10]. So 'in this view' it can be concluded that an e-mail serves as a notification. Moreover this matter can be dealt with between parties in an agreement or in general terms and conditions on the invoice, which would certainly facilitate the burden of proof concerning the notification.

## 4. Declaration of a claim in bankruptcy procedures

A creditor must file his declaration of claim together with all relevant titles at the clerkship of the Court of Commerce (art. 62, Bankruptcy Act of 8 August 1997). The receiver in bankruptcy will check the claim and the evidence (titles) presented to him by the creditors. This evidence can be invoices, extracts of bank accounts, commercial papers, contracts etc, but also other elements than written documents.

The principle of free evidence in commercial matters and the presumption principle of article 25 of the Commercial Code apply. Hence, read in conformity with the European Directives mentioned above, a printout of an e-invoice would be a sufficient title to substantiate a claim, certainly in combination with other elements such as the corresponding order note, contract, etc. Also the electronic version could be filed as such evidence. In this case the receiver should be able to verify the e-invoice and will need to have the necessary software at his disposal.

If the receiver in bankruptcy would repudiate the claim, the matter will be decided before the Court of Commerce, as is done with claims based on a paper invoice. Here also, parties could have made an agreement about the accepted means of evidence.

## 5. Invoice as a title to obtain sequestration of goods

Also today, a copy or a duplicate of an invoice, if necessary produced before the judge jointly with the accounting books of a merchant, can be considered as a serious presumption on the basis of which the judge can allow the sequestration of goods. It seems logical that an original invoice is not required, because the creditor will already have sent his original to the debtor. In this light, a print of the e-invoice could also be used. The appreciation of the judge is the predominant factor in this matter, since there are no formal rules regarding this topic.

The same reasoning can be followed for the special procedure of *saisie-arr* or *beslag onder derden* i.e. the seizure in the hands of a person who is the debtor of one's own debtor, (e.g. balance of a bank account) which can be executed directly by a bailiff, whereby the judge has an ex-post control possibility. In both cases, there are good arguments to argue that the electronic version could also be filed, but in that case the judge or bailiff will need the necessary software in order to verify the e-invoice.

## 6. Conclusion

While Member State law can be construed and interpreted according to the European Directives, for legal issues not covered by the E-invoice Directive, a legal initiative (on Member State or EU level depending on the competence and the principle of subsidiarity) could be taken to confirm legal certainty for those issues.

E-invoices and paper invoices should have the same legal value. This is especially the case when the security issues are covered, such as the authenticity of the origin and the integrity of the contents (i.e. essential requirements of the E-invoice Directive), so that can be assured that the invoice remains unchanged and readable. The E-invoice Directive is an amendment to the 6th VAT-directive and has the same territorial application. The application of the E-invoice Directive is not restricted to suppliers established in the European Union. Any supplier making supplies that take place within the European Union (goods or services) is required to apply the rules of the E-invoice Directive which are common in all EU member states. In that case a VAT-compliant invoice should be made available to the customer. This should allow him to exercise his right to deduct any input VAT.

## Footnotes

1 The author is a company lawyer at Isabel nv/sa, a certification service provider in e-banking, e-government and e-business. The present article is written in his personal capacity. A previous version of this paper served as conference proceedings on the ISSE conference in Paris on 2 October 2002. The present version is an updated and adapted version.

2 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, OJ, 17 July 2000, L 178/1.

3 Explanatory Statement of the proposal of the Electronic Commerce Directive : COM (1998), 586, p.27-28.

4 Directive 2001/115/EC, of the European Council of 20 December 2001 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, OJ, 17 January 2002, L15/24.

5 Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures, OJ, 19 January 2000, L13/12.

6 See i.a. D. GOBERT, ??Vers une discrimination de traitement entre la facture papier et la facture ??lectronique ???, Cahier du Juriste, n?? 4-5/2001, pp. 43-52 and the legal doctrine mentioned there.

7 For more technical and legal background information about archiving: see i.a. the link ??digital archival? ? on <http://www.law.kuleuven.ac.be/icri/research.php>

8 D. GOBERT, E. MONTERO, ??L??ouverture de la preuve litt??rale aux ??crits sous forme ??lectronique??, J.T. 2001, n??000, pp.122, 126. Also available on [www.droit-technologie.org](http://www.droit-technologie.org)

9 S. DE KEYSER, ??De wettelijkheid van elektronische facturen??, Computerrecht 2002/3, 117.

10 P. WERY, ??Le nouveau r??gime de l??opposabilit?? de la cession de cr??ance?? in L??opposabilit?? de la cession de cr??ance aux tiers, La Charte, n??34. The notification by electronic means is discussed by M.E. STORME, Het verrichten van rechtshandelingen door middel van nieuwe telecommunicatiemiddelen ?C De nieuwe wetsbepalingen ingekaderd in de algemene leer van de kennisgeving, R.W. 2001-02, 433-447, and also [www.storme.be/2281.pdf](http://www.storme.be/2281.pdf)