

Benchmarking of existing national legal e-business practices

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Country report - Germany

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| Prepd. | Dirk Hoffmann |

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Germany

1. General information on the national legal system

The Federal Republic of Germany is a democratic parliamentary federal republic, made up of 16 states, which in certain spheres act independently of the federation. The Federal Republic of Germany is a member state of the United Nations, NATO, the G8 and the G4 nations, and is a founding member of the European Union. It is the European Union's most populous and most economically powerful member state.

The usual way to implement an EU Directive in Germany is to make a specific law containing all regulatory provisions. If a Directive concerns an already regulated field, the regulatory provisions are most often implemented through changes in the existing legislation by introducing or changing articles within the existing laws.

The German legal system adheres to the civil law tradition based on principles of Roman law as a basis of the German judicial system. Legal principles are organised into a number of codes. Judges decide in each specific case on the basis of the legal principles.

According to the German tradition of civil law, written legislation is the most important legal source. Court decisions are also considered important sources of law, but courts are not required to follow previous precedence even if it originates from a court placed higher in the judiciary system.

Commercial disputes are typically dealt with by the county courts for matters with a financial value of up to 5,000.00 EUR. For matters of a greater financial value, the cases are brought before the state court and if appealed are brought to the regional higher court.

In Civil Law court cases, only those arguments will be considered which are brought before the court by either of the parties. Evidence is considered by court if the parties of the dispute choose to bring evidence before the court.

Contracts are considered binding for both parties and will be evaluated and defined by the courts in order to decide in disputes. Consumers enjoy higher protection within business-to-consumer (B2C) contracts whereas regarding business-to-business (B2B) contracts the involved parties are considered knowledgeable and are far less protected by the law.

The parties of a contract are also free to choose arbitration for settlement of a dispute. Mediation is always possible however mostly used between businesses and between private persons in divorce cases. In some German states disputes need to be brought before

the court of arbitration before filing a case before the county court (e.g. in Northrhine-Westfalia for matters with a financial value of less than 600 EUR). However this procedure can be bypassed if a court order is applied for and issued.

Consumers may choose to bring disputes concerning delivery of goods and services, including disputes pertaining to e-commerce, before the Consumer Protection Associations which are organized on a federal and a state level. These associations are entitled to file cases before the relevant courts but are not able to decide cases by themselves.

A growing number of consumers choose to file civil law cases due to the fact that insurances covering legal fees are widely spread among German consumers.

2. Electronic signatures

2.1 National legislation and administrative practices

Prior to the implementation of the Directive, Germany already had a law governing e-signatures. The exact name of the law was Act on Digital Signatures¹ as published in Federal Law Gazette² 1997 I 1872. Based on this law e-signature applications were tested in a series of projects, the Media@Komm-Projects³. Due to strict regulations issued by the Regulation Authorities for Telecommunication and Mail⁴ only the Deutsche Telekom AG and the Deutsche Post AG offered certificates in the year 2000.

Germany implemented Directive 1999/93/EC with the Signature Act⁵ which entered into force on 22 May 2001. The exact name of the law implementing the Directive is "Law governing Framework Conditions for electronic Signatures and Amending other regulation⁶. This law annulled the previous law from 1997. It also used the term "electronic signature" instead of "digital signature".

The central statement of the Act is that digital signatures qualify for written signatures if they fulfil the defined requirements of so called qualified signatures. One major difference between the newly introduced Signature Act and the earlier Act on Digital Signatures was that an authorization by the regulation authorities was no longer required to issue certificates⁷. Instead, a monitoring system and

¹ Gesetz zur digitalen Signatur

² Bundesgesetzblatt

³ www.mediakomm-transfer.de

⁴ Regulierungsbehoerde fuer Telekommunikation und Post

⁵ Signaturgesetz (SigG); http://bundesrecht.juris.de/sigg_2001/

⁶ Official Journal – Bundesgesetzblatt – BGBl. Teil I vom 21. Mai 2001; 217.160.60.235/BGBl/bgbl1f/b101021f.pdf

⁷ compare Art. 3, 1 Directive 1999/93/EC

regulations about the liability of certification-service-providers in accordance with Art. 6 Directive 1999/93/EC were introduced⁸.

Recent changes of the Signature Act were introduced by a further amendment called Signature Modification Act⁹.

One of the main reasons for changing the regulations was to simplify the application for an advanced signature card based on a qualified certificate and at the same time reduce the costs. Whereas before it was necessary for a person applying for a qualified signature chip card to apply in person and provide proof of his or her identity it is now possible for certification-service-providers to issue chip cards without personal identification of the applicant at the time of application. It is now possible to base the identification process on other identification processes or data completed earlier in time. This applies especially to banks which can use their already available customer data to issue chip cards. Furthermore, internet-based application processes for the chip cards were made possible.

These changes were made in an effort to boost the low distribution rate of qualified digital signatures within Germany. While most bank transactions use the PIN/TAN approach qualified signatures are not widely spread. One reason for the still low demand for qualified digital signatures is that most processes and transactions between citizens, between a citizen and a company and between companies simply do not require a written signature by law. Most solutions therefore do not require a qualified signature and are based on easier-to-use and cheaper solutions like advanced signatures. While transactions between government and citizen as well as between government and companies mostly do require a written signature the actual number of interactions with the government is often considered too small in order to invest in a qualified signature.

Certification-service-providers are free to set their own prices. As all relevant providers of digital signatures are accredited, such internal costs for the certification-service-providers add to the price. For a private citizen a starter package including hardware (card reader), software and the chip card would cost about 60.00 EUR. In the following year the costs would be about 25.00 EUR. Special conditions for multi-users are possible.

Most users of qualified signatures are therefore so called "power-users" like lawyers or businesses with a high number of transactions with certain government institutions.

Government agencies, public authorities and businesses have to pay initial costs for acquiring certificates to employees. The price structure is complex and depends on the size of the organization,

⁸ "Erstes Gesetz zur Änderung des Signaturgesetzes"; compare Art. 3, 2 and Art. 6 Directive 1999/93/EC

⁹ Official Journal – Bundesgesetzblatt – BGBl. Teil I vom 10.1.2005;
http://www.recht.makrolog.de/bgblplus/bd_bgbl1.nsf/webhefte2/TIJ2005Nr00001x

type of use (communication with public authorities, secure e-mail, secure log on, etc.) and finally which type of central signature application the organization wants to use.

Other changes in regulations had the purpose of adapting the regulations to experiences made in the issuing of digital signatures. It was clarified that the certification-service-provider may deny issuing certificates based on pseudonyms. At the same time regulations dealing with the disclosure of pseudonyms were adapted.

The Signature Act defines four types of digital signatures and their requirements. A basic signature¹⁰, an advanced signature¹¹, an advanced signature based on a qualified certificate¹², and an advanced signature based on a qualified certificate with accreditation¹³.

Among the digital signatures the basic signature is defined as electronic data which is added to or logically connected with other data and which allows the identification of the signatory. An example of a basic signature is a scanned signature. While the scanned signature still allows the identification of the signatory it does not allow the detection of possible changes made to a document containing the signature. A scanned signature can be copied and pasted onto other documents and the content of the document itself can be changed.

The advanced signature is defined by the following requirements. The signature needs to be solely assigned to the private key holder. It must allow the identification of the private key holder. It must be generated with methods controlled only by the private key holder. Finally, the signature must be connected with the relevant data it is being applied to in a way that changes made later to the data can be detected. Advanced signatures are usually software based. Examples are S-Mime or Pretty Good Privacy (PGP) applications.

Both, the basic and the advanced signature do not qualify for written signatures. They can be issued for a natural person or a legal person, e.g. a company.

The advanced signature based on a qualified certificate does qualify for a written signature. This signature has to fulfil the requirements of the advanced signature. In addition, it has to be created with a secure signature-creation device and it needs to be based on a qualified certificate valid at the time of signing. The certificate identifies the signatory. The certification-service-provider or trust center needs to ensure the security of the process. A secure signature-creation device is a combination of hard- and software which provide for saving and using the private key. Certification-service-providers can be inspected randomly or due to specific reasons by the regulation authorities after the providers have started

¹⁰ § 2 I SigG

¹¹ § 2 II SigG

¹² § 2 II SigG

¹³ § 15 I SigG

their businesses. Inspections are made by the Federal Agency for Electricity, Gas, Telecommunication, Mail and Railroad¹⁴. In addition, the certification-service-provider is liable for damages deriving from failures to comply with the requirements.

The advanced signature based on a qualified certificate can only be issued for a natural person.

The content of qualified certificates is meant to confirm the identity of the signatory. This is done through the certification-service-provider¹⁵. According to § 14 I SigV the information given must not leave room for any misunderstandings. According to § 16 I SigG the regulation authorities are allowed to issue so called root certificates for accredited certification-service-providers. For providers of qualified signatures which are not accredited it is possible to receive a root certificate from another certification-service-provider. With such a cross-certification process it is possible to eliminate self-certification.

According to § 7 I Nr. 1 SigG the qualified certificate needs to contain the name of the private key holder. According to § 5 III 1 SigG it is also possible to use a pseudonym.

The advanced signature based on a qualified certificate with accreditation has to fulfil the requirements of an advanced signature based on a qualified certificate. It therefore qualifies for a written signature in accordance with Art. 5 I Directive 1999/93/EC and can only be issued for a natural person. An added requirement is the voluntary accreditation which has replaced the former mandatory authorization by regulation authorities. The accreditation process includes an inspection of conformity with the relevant requirements before services are provided. Inspections are repeated regularly and include the certification-service-provider and its products. In case a certification-service-provider is not able to pursue its business the regulation authorities will also take over.

In the case of a dispute over the conformity with requirements an advanced signature based on a qualified certificate with accreditation will be viewed by court as „prima facie” proof. In the case of an advanced signature based on a qualified certificate without accreditation the court would order an expert analysis to be conducted.

According to § 416 of the Code of Civil Procedure¹⁶ only signed paper documents present full proof of the connection between a declaration and the signatory. According to § 371a I 2 of the Code of Civil Procedure a document signed with a qualified signature with accreditation however allows the court the assumption that the document was signed by the holder of the signature. A person

¹⁴ Bundesnetzagentur fuer Elektrizitaet, Gas, Telekommunikation, Post und Eisenbahnen - the former Regulierungsbehoerde fuer Telekommunikation und Post

¹⁵ compare § 7 SigG

¹⁶ Zivilprozessordnung (ZPO); <http://bundesrecht.juris.de/zpo/>

challenging this assumption would therefore have to present valid arguments against this assumption. Electronic signatures are therefore admissible as evidence in legal proceedings.

While qualified e-signatures may be offered without approval by the authorities (and therefore in accordance with Art. 4) providers may apply for accreditation. To this point all main German certification-service-providers have chosen to undergo the accreditation process.

While there is legal certainty if defined as clarity, definition and consistency of legal questions within an appropriate amount of time it is difficult for the end user to fully evaluate which certification provider is trustworthy. A local or foreign provider who is not known like Deutsche Telekom or Deutsche Post may offer a qualified certificate but may have difficulty to be recognized. The accreditation process introduced in Germany is trying to solve this problem¹⁷.

Furthermore the e-signature does not automatically function as a means of authentication within the electronic world. It is necessary to implement the e-signature in a holistic identification management structure which contains the relevant aspects of data protection as well.¹⁸

The goal of the Federal Government's BundOnline 2005 project was to offer all services of the federal administration which are suited for the internet as online services by 2005. Those transactions which required a written signature therefore needed the digital signature in order to comply with the law. The intention of the initiative was to reduce bureaucratic obstacles, to extend in a lasting manner the range of services offered to the citizens and businesses, and to improve the communication within the federal administration as well as with the states and communities.

The newly built signature alliance consisting of government and private entities is slowly showing progress. In some areas the formal requirements are also being reconsidered. Future public procurement for instance may allow the advanced e-signature rather than requiring the qualified e-signature. The average consumer however still lacks applications for the qualified e-signature.

Another major aspect hindering the further development of e-business, especially the distribution of electronic signatures, is middle- and long-term filing. Standards are still to be developed.¹⁹

The German legislation does not provide any special requirements for the use of standards.

¹⁷ View of national expert Dipl.-Jur. Claas Hanken, Information Management Inst

¹⁸ View of national expert Dipl.-Jur. Claas Hanken, Information Management Institute

¹⁹ View of national expert Dipl.-Jur. Claas Hanken, Information Management Institute

The certification-service-providers associations Trustcenter-Vereinigung T7 and TeleTrust e.V. agree on the ISIS-MTT-Standard in order to be able to exchange documents with signatures of different providers.

While the public sector offers different applications (Sphinx within the federal government administration and ELSTER in tax declarations) the banking sector promotes their own solutions for secure electronic exchange of communication and encoding digital messages like PIN/TAN applications.

The Signature Act defines the security requirements which the Public Key Infrastructure is based on.²⁰

Inspections of Certification-service-providers are initiated by the Bundesnetzagentur. Users who want to test the validity of a certificate can use an online service.

The inspections of security concepts, components and products are conducted by the following institutions:

- Bundesamt für Sicherheit in der Informationstechnik
- TÜV Informationstechnik GmbH, Unternehmensgruppe TÜV NORD
- Zertifizierungsstelle der T-Systems, T-Systems GEI GmbH, BU ITC Security

The Bundesnetzagentur regularly lists an overview of mathematical methods considered secure and states the expiration date.

Along with the introduction of the Signature Act further laws were adapted to the use of digital signatures. A blanket clause in the German Administrative Procedure Act²¹ states that qualified signatures qualify as written signatures. Before the introduction of this clause the German states of Bremen and Baden-Wuerttemberg had already released experimental clauses.

Government, regional and local authorities are obliged to receive secure e-mail with electronic signatures if they have granted access. Most authorities however do not yet possess the systems necessary to evaluate and process documents with electronic signatures. Most authorities have therefore explicitly denied access of documents with electronic signatures while building an infrastructure which will allow them to receive and process such documents.

There are currently 29 accredited certification-service-providers. In one case the former accreditation for a provider was revoked.

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

²⁰ § 15 f. SigG

²¹ § 3a Verwaltungsverfahrensgesetz VwVfG

from other membership countries are therefore treated in the same way as qualified signatures originating from Germany.

Foreign certification-service-providers are able to apply for and receive accreditations. However, ensuring the monitoring process according to the Signature Act is considered highly complex by the Bundesnetzagentur.

The Bundesnetzagentur has been approached by companies from the USA, UK and other countries regarding accreditations. A first project realized was the accreditation of a certification-service-provider for time-stamp services in Switzerland.

On a more practical level, e-services only accept use of specific approved types of signatures. This is due to both technological and financial issues. To accept a specific type of signature and to correctly read and interpret the content of the certificate, the receiving system has to be specifically configured. When accepting an electronic signature, validity must be checked with the issuing CA. This may involve financial and contractual issues that have to be dealt with, if a clearing arrangement is not in place.

3. General elements of electronic contract law

Directive 1997/7/EC on the Protection of Consumers in Respect of Distance Contracts has been implemented through the Distance Selling Act²² which was amended by the Law of Obligations Modernization Act²³ of November 2001 introducing §§ 312 b ff. of the German Civil Code²⁴.

Directive 2002/65/EC and the amending Directives 90/619/EEC, 97/7/EC and 98/27/EC on the distance selling of financial services were implemented through the modification of §§ 312 b to d, 355 and 357 German Civil Code from December 2004²⁵.

Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees has been implemented in national law through the Law of Obligations Modernization Act. The requirements of Art. 3 have been implemented mainly via the introduction of §§ 437 to 441 German Civil Code, in connection with distance selling contracts in §§ 312 b to 312 f German Civil Code, and regarding terms of contract in §§ 305 to 310 German Civil Code.

²² suspended in 2002

²³ Gesetz zur Modernisierung des Schuldrechts;
<http://217.160.60.235/BGBL/bgbl1f/b101061f.pdf>

²⁴ Bürgerliches Gesetzbuch

²⁵ BGBl. I, 2004, p. 3102

Directive 1998/6/EC on Price Indications has been implemented through the Quotation of Prices Regulation²⁶ from March 1985, amended October 2002, forcing businesses to state prices with VAT and to indicate otherwise that prices without VAT are only meant as information for other businesses.

Directive 2000/31/EC on information society services, in particular electronic commerce has been implemented through the introduction of the Teleservices Act²⁷ from July 1997, amended December 2001 and § 312 e German Civil Code which especially introduces the information obligations for providers of services and products²⁸.

3.1 National legal and administrative practices

Distance selling contracts by German law are defined as contracts involving the delivery of products or services between a consumer and a business using means of distance communication including among others the use of email and tele- and mediaservices.²⁹

The regulatory framework for all contracts (including electronic contracts) is based on the German Civil Code. By German law, a written signature is not necessarily required for a contract or a declaration to be valid. A contract about selling a car for instance is valid if two corresponding declarations about all relevant aspects of the sell-buy-agreement were given and received by the parties. It is not necessary to have one or both parties sign a written contract.

However, a signed contract may serve as evidence of the contractual obligations.

A written signature is required by German civil law only in certain situations in which some or all of the functions of a written signature are required which are authenticity, identity, connection with a declaration, and a sign of warning. Examples for such situations in which a written signature is required are the acknowledgement of debt, the declaration of termination of a labour contract and the declarations within the civil ceremony of a marriage contract. In these cases for instance the requirement of a written signature is supposed to encourage the signatory to rethink his decision before saying "yes".

Those declarations which were not form-bound were valid also in electronic form even before the adaption of regulations. After the introduction of the Adaption of Civil and other Formal Requirements to Modern Practice Act those declarations for which the law demanded the written form could now be given in electronic form.

²⁶ Preisangabenverordnung, BGBl I 1985, p. 580

²⁷ Teledienstegesetz; <http://www.gesetze-im-internet.de/tdg/>

²⁸ § 6 Teledienstegesetz

²⁹ § 312 I b BGB

According to § 126 III of the German Civil Code³⁰ the “electronic form” is accepted as the written form. In order to fulfil the requirements of the electronic form the declaring person according to § 126 a of the German Civil Code has to add his name to the declaration and sign the document with a qualified electronic signature according to the Signature Act. A contract based on electronic declarations with the requirement of the written form therefore needs to contain two corresponding declarations signed with the signatories’ digital signatures.

According to § 126 b the “text form” is being introduced as a new legal form. A law may require the text form if the declaration shall be permanently retractable but without the demand of a written signature. It is being argued that the introduction of such a form was not necessary as its application to certain regulations like the landlord’s notice about upcoming repairs and the corresponding right of the tenant to terminate the contract³¹ could have been exchanged with simply not asking for any particular form of declaration.³²

In general the electronic form is prohibited for declarations like the certificate of bond, the declaration of taking over someone’s debt and the confirmation of an existing debt since the electronic form is lacking a warning function.³³ This is in accordance with Art. 9 II Directive 2000/31/EC.

In these and other cases not even the digital signature will qualify as a written signature because these are cases in which the lawmakers would like to put emphasize on the warning effect which is inherent to signing by hand. It is being argued that such exemptions are not necessary as the actions necessary to perform the act of signing with the digital signature serves a warning function just as well as signing by hand.³⁴

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 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.

Such electronic signatures, though, at this point in time are not qualified electronic signatures but mostly advanced electronic signatures.

³⁰ Bürgerliches Gesetzbuch (BGB); <http://bundesrecht.juris.de/bgb/>

³¹ Mitteilung des Vermieters von Maßnahmen zur Verbesserung etc., daraufhin Kündigungsrecht des Mieters, § 541 b II 1 BGB

³² Compare Detlef Kroeger in Kroeger/Hoffmann, Rechtshandbuch zum E-Government, Dr.Otto-Schmidt-Verlag, 2005, p. 146

³³ Compare §§ 766, 780, 781 German Civil Code

³⁴ Compare Detlef Kroeger in Kroeger/Hoffmann, Rechtshandbuch zum E-Government, Dr.Otto-Schmidt-Verlag, 2005, p. 145

§ 312 e of the German Civil Code defines the circumstances under which a contract is valid if a business is using tele- or media services to offer a contract about the delivery of goods or services to a customer.

With regard to the use of distance communication means § 312 b I and II German Civil Code are in accordance with Art. 2 Nr. 1 Directive 1997/7/EC since the whole time from the negotiations to the finalization of the contract are included. § 312 b III German Civil Code is in accordance with Art. 3 but also includes distance learning. § 312 b III Nr. 3 German Civil Code excludes insurances. These are regulated within §§ 48 a ff Insurance Distance Selling Act³⁵.

Tele services are defined as services dealing with individual communication (e.g. tele banking) or a data base where a list of goods or services is combined with an interactive access and the option of order placements (e.g. tele shopping).³⁶ Further relevant regulations were implemented in the Mediaservices State Contract³⁷.

A product placement or an invitation to the viewer to place an order is not considered a legal offer which is then accepted by the viewer. It is rather an invitation to the viewer to make an offer himself which is then accepted by the provider of the goods or services.³⁸

As in a shop window offers presented in the internet to any viewer do not constitute a legal offer but invite the viewer to make an offer himself.

An order of an item placed on a website at a certain price therefore does not constitute a contract as the acceptance still needs to be declared by the provider of the item. Therefore posting an item with a wrong price is would not force the provider to sell at this price (LG Essen, decision 13.02.2003, 16 O 416/02).

A different situation occurs if an internet auction was conducted and the seller has indicated that he wants to sell the item for a minimum price. Such action is not considered an invitation but rather a valid offer (OLG Hamm, decision 14. Dezember 2002, U 58/00).

As contracts can be agreed upon by consumers as well as by businesses there are no differences in B2C or B2B relationships regarding the general agreement of a contract defining the sell/buy decision of a product or service.

However certain obligations defined by the law are considered not valid in a contract between a consumer and a business when it comes to distance selling using electronic means.

³⁵ Compare §§ 48 a ff. VVG; <http://www.gesetze-im-internet.de/vvg/index.html>

³⁶ § 2 II Nr. 1, 5 Teledienstegesetz (TDG); <http://bundesrecht.juris.de/tdg/>

³⁷ Mediendienstestaatsvertrag (MDStV); www.uni-stuttgart.de/impressum/mdstv.pdf

³⁸ So called „invitatio ad offerendum“

This includes the transfer of perils if the product is agreed to be sent.³⁹ Furthermore all agreements regarding the (business) seller's liability made before the discovery of a defect are not valid.⁴⁰ Liability cannot be limited to less than two years regarding new products or than one year regarding used products.⁴¹ Also the consumer does not have to prove that a defect already existed during the first six months⁴².

3.1.2 *Electronic acceptance*

§ 312 e German Civil Code implements Art. 10 and 11 2000/31/EC by stating the requirements of the circumstances under which a B2C contract may be considered concluded.

As two declarations need to be exchanged the question mostly is whether they were accessed. A given declaration is considered accessed or received once the person receiving the declaration under normal circumstances would have been able to access the information.⁴³ Art 11 I 2 Directive 2000/31/EC may differ from this description as it sees the general possibility to access information as access given. However the Directive describes order and confirmation and may therefore not be applicable to the general definition of access to declarations.

§ 312 e of the German Civil Code applies to both consumers and businesses. Under this regulation a customer may have the right to be reimbursed if certain requirements are not provided by the business offering the goods or services.

1) The customer needs to be able to recognize and correct wrong entries during the order process.⁴⁴

2) The business needs to provide information about the contract, the terms of payment and delivery. Very important information like address, information about withdrawal, termination of contract, warranty and customer service shall be pointed out especially by using underlined or bold writing.⁴⁵ Information about customer service and warranty only needs to be included if the contract differs from the standard set by the German Civil Code. A business does not need to inform the consumer about his rights according to the law.

The information needs to be provided within the time of completion of all contract duties.

3) The business needs to immediately confirm an order given by the customer.

³⁹ § 447 BGB

⁴⁰ § 475 I BGB

⁴¹ § 475 II BGB

⁴² § 476 BGB

⁴³ § 312 e I 2 German Civil Code

⁴⁴ § 312 e I Nr. 1 BGB

⁴⁵ § 312 e I Nr. 2 BGB; compare § 312 c II BGB i.V.m. § 1 IV BGB-InfoV

4) The customer needs to be able to view and save the terms of contract.⁴⁶ If the terms are valid however depends on the individual terms⁴⁷ and does not depend on (electronic) form.

If a contract is concluded through the exchange of individual emails or similar individual conversation requirements 1), 2), and 3) do not apply.

Agreements between a business and a consumer excluding one or more of the requirements mentioned above are invalid. Agreements between businesses are valid, requirement 4) however cannot be excluded.

If the customer has the right to revoke an order⁴⁸ the limited time period begins only after all requirements were met.

The order process needs to be supported with technical information and help functions.⁴⁹

It has not been decided if the consumer needs to be informed about his right of withdrawal via a pop-up or if a note about the possibility to take notice will serve.⁵⁰

In transactions between business and consumer the courts ask for a clear direction toward the information. Checking a box next to a statement that the information has been read may not be seen as sufficient, the text may rather need to be "forced" upon the consumer.⁵¹

3.1.2.1 Information obligations in relation to electronic contract conclusion

The information obligations introduced in §§ 312c German Civil Code in connection with the German Civil Code Information Obligation Regulation⁵² are implementing the requirements of Art. 4 and 5 Directive 1997/7/EC. § 1 I Nr. 4 German Civil Code Information Obligation Regulation demands the seller to inform about the conclusion of contract. While Art. 4 I h Directive 1997/7/EC demands information regarding the validity of an offer or the price for every deal § 312 c I 1 German Civil Code in connection with § 1 I Nr. 12 German Civil Code Information Obligation Regulation demands this only for offers with time limitation. Most offers however are limited in some way.

While § 312 c II German Civil Code in connection with § 1 IV German Civil Code Information Obligation Regulation demands the text form (§ 126 German Civil Code) with regard to the information Directive

⁴⁶ § 312 e I Nr. 4 BGB

⁴⁷ Compare § 305 II BGB

⁴⁸ Compare § 355 BGB

⁴⁹ Compare § 312 e BGB

⁵⁰ Compare decision OLG Frankfurt am Main, 6 W 37/01

⁵¹ Compare decisions OLG Karlsruhe, 6 U 200/01 and OLG Frankfurt, 6 W 37/01

⁵² BGB-Informationspflichten-Verordnung

1997/7/EC allows paper form and data form which in the latter case could also mean spoken words.

If the information obligations are not fulfilled § 312 d II German Civil Code allows the customer to withdraw from the contract. § 312 d I in connection with § 355 German Civil Code allows the consumer to withdraw from contract or – according to § 356 German Civil Code – return the items purchased, implementing Art. 6 I 1 Directive 1997/7/EC. For such an announcement of withdrawal the German law demands textform while the Directive does not ask for a specific form.

The following information needs to be provided by a business offering services/products via the internet to customers which are either businesses or consumers⁵³.

- a) Name and address of the business offering a product/service
- b) Name of the person responsible in case of a legal person
- c) Contact data for electronic communication including an email address
- d) Trade register and register number
- e) VAT identification number
- f) Supervising authority if service needs to be approved by authority
- g) Freelancers need to provide those regulations applicable. This information may be provided directly or via links.

In addition, the further information obligations regarding goods, price, possibility to withdraw from contract etc. apply.

The provider information needs to be easily noticeable, immediately accessible, and always present.⁵⁴ If the consumer needs to search for the information such a search activity shall not be difficult or considered time consuming. Immediate access is given if the consumer only needs one to two mouse clicks to get to the information.⁵⁵ The information is not easily noticeable if the consumer needs to scroll down or klick on different pages in order to find the information.⁵⁶

A business also needs to inform a consumer in text form⁵⁷ about all relevant aspects of payment and delivery of the goods or services ordered.⁵⁸

Additional costs for delivery for example need to be specified and pointed out to the consumer.⁵⁹

⁵³ Teledienstegesetz (TDG)

⁵⁴ § 6 S.1 TDG

⁵⁵ Compare decision OLG München, 29 U 2681/03

⁵⁶ Compare decision OLG München, 29 U 4564/03

⁵⁷ See explanation text form above

⁵⁸ § 312 c I 1 Nr. 1 BGB i.V.m. § 1 I Nr. 8 BGB-InfoV;
see also § 312 c II BGB i.V.m. § 1 I Nr. 8, II BGB-InfoV; www.gesetze-im-internet.de/bgb-infov/index.html

According to recent court decisions information about VAT and delivery costs need to be placed close to the products. Alternatively the consumer can be given the possibility to access such information via a "speaking link" which would lead the consumer to continue clicking until he reaches the information.⁶⁰ It would therefore not be sufficient to place the word "price" as a link.

The obligatory information needs to be presented to the consumer in due time before the consumer himself has made his declaration, may it be the offer or accepting an offer made by the business. This modification of existing regulations was introduced in December 2004 in order to cover those cases in which the consumer reacts to the business' invitation to make an offer⁶¹. The wording of presenting the information is "to make available"⁶² and does not ask for a provable success in understanding.

Between businesses it is possible to agree to leave out information obligations.

Court decisions have been defining the range of sufficient and not sufficient information but may also differ.

- The indication „more information" with an attached link to the price information is not sufficient to inform the consumer about the prices (Hanseatisches Oberlandesgericht Hamburg, decision 3.2.2005, 5 U 128/04)
- The indication „top daily price" with an attached link to the price information is not sufficient to inform the consumer about the prices (Hanseatisches Oberlandesgericht Hamburg, decision 6.11.2003, 5 U 48/03)
- However a final price of a flight does not need to be shown if it can be generated easily via electronic links (BGH, decision 3.4.2003, I ZR 222/00)
- Information may be made available on other than the front website (LG Traunstein, decision 18.05.2005, 1 HK 5016/04)
- Electronic contact data does not need to include the telephone number (OLG Hamm, decision 17.03.2004, 20 U 222/03).
- Electronic contact data must include the telephone number (OLG Köln, decision 13.02.2004, Az 6 U 109/03)

⁵⁹ § 1 II Preisangabenverordnung (PAngV); www.gesetze-im-internet.de/pangv/index.html

⁶⁰ Compare decisions OLG Hamburg, 5 U 128/04 and OLG Hamburg, 5 U 187/03
Compare § 1 II Preisangabenverordnung (PAngV)

⁶¹ Invitatio ad offerendum; compare § 151 BGB

⁶² "zur Verfügung stellen"

- Hiding the necessary information between a considerable amount of data and numbers will not suffice (LG Essen, decision 4.6.2003, 44 O 18/03)
- It is insufficient if further information regarding the right of withdrawal is positioned under „information about the seller“ and „me“ (OLG Hamm, decision 14.04.2005, Az.: 4 U 2/05)
- Small and hidden text regarding consumer information is not sufficient if the consumer is bound to believe that he has received all available information (Hanseatisches Oberlandesgericht, decision 27.3.2003, Az: 5 U 113/02)

3.1.2.2 Standard terms and unfair clauses

Directive 1993/13/EC has been implemented in national law through an introduction of changes within the General Terms of Contract Act⁶³ which was later integrated into the German Civil Code by the Law of Obligations Modernization Act where it is defined in §§ 305 to 310 German Civil Code.

The General Terms of Contract Act exceeds the requirements given by the Directive as it is applicable to contracts B2B, B2C and C2C. § 310 III German Civil Code specifically implements the Directive. If applicable it refers to the other regulations defined in this section of the German Civil Code. §§ 308 and 309 German Civil Code include the lists of forbidden clauses. However § 308 German Civil Code allows for an interpretation according to the specific contract in question while § 309 German Civil Code includes absolute forbidden clauses. The list given by Art. 3 III however functions as a means of interpretation and is not in exact accordance with the German regulations.

Terms of contract may be included in a contract or in a separate document.⁶⁴ The regulations for terms of contract do not apply if both parties had a realistic chance of influencing the content of the contract.⁶⁵ This will usually not apply to usual online buy-and-sell contracts between a business and a consumer.

The terms of contract need to be included in the contract. For this the customer has to be able to take notice of the terms and has to agree to include them in the contract. Even if such an agreement was reached certain types of clauses are prohibited, for instance surprising clauses.⁶⁶ The validity of terms of contract is being decided in each single case. Terms may also not be applicable due to the fact that clauses are hard to understand.⁶⁷ If terms of contract are not

⁶³ AGB (Allgemeine Geschäftsbedingungen) Gesetz

⁶⁴ § 305 I BGB

⁶⁵ § 305 b BGB

⁶⁶ § 305 c BGB

⁶⁷ § 307 BGB

valid the contract itself will be valid under the general terms of the law.⁶⁸

Between businesses it is sufficient to include terms of contract if one of the parties mentions them and the opposing party is able to view the terms. This is also valid for terms positioned on websites. However, the party desiring to apply the terms needs to indicate such desire. A business does not need to offer the terms but may make them available upon request (OLG Bremen, decision 1U 68/03)

The technical solution mostly used is that the recipient must work through the terms of the contract in order to proceed on the conclusion of the contract. This can be done by the consumer "passing" and "confirming" a page with contract terms before the contract is concluded, possible by the terms appearing in full text on the page and the consumer confirming that he/she has seen it by scrolling down over the page and clicking on a confirmation button.

The question of whether individual clauses of the standard terms are valid depends on whether the clauses have been accepted and if they are of a surprising nature, meaning that in a comparable context the parties would not agree on such a clause. If a term of a standard contract is very unfavourable for the consumer in a consumer agreement, it seems likely that the clause would only be valid if the clause has been specifically accepted by the consumer.

3.1.3 *Choice of law and forum*

In Germany, legal principles are organized around a number of codes which may be applied on a federal and a state level. Less emphasis is put on case law in favour of regulation, although court judgments are considered as sources of law.

Germany has signed the Rome Convention on the law applicable to contractual obligations.

Germany has adopted the Brussels and Lugano Conventions on jurisdiction and the enforcement of judgments in civil and commercial matters. Germany has ratified the CISG convention (United Nations Convention on the International Sale of Goods).

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. § 4 Teleservices Act⁶⁹ implements Art 3 in so far.

This however is still not viewed as a stable position. While in the home country of the provider the home jurisdiction is applicable, the

⁶⁸ § 306 BGB

⁶⁹ The TelediensteGesetz has been implemented on a state level using the Mediendienste Staatsvertrag

country in which the service is accessed may still choose the more favorable law.

3.2 Cross border regulatory issues

Different time limits to withdraw from a contract within the member countries pose a difficulty to businesses which service consumers across borders. Until now the easiest but not best solution was to simply allow the largest time period for consumers in order to save the effort and expenses of providing different contracts for different countries.⁷⁰

Furthermore 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 posing an obstacle to the cross-border use of electronic contracts.

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

4.1 National legislation and administrative practices

The Invoice Directive 2001/115/EG, which amended Directive 77/388/EEC in regard to simplifying, modernising and harmonising the conditions laid down for invoicing in respect of value added tax, was transformed into national German Law through Article 5 and 6 of the second Tax amendment law introduced on December 15^t 2003⁷¹.

The transposition of Directive 2001/ 115/ EC into present law through the Tax Amendment Law⁷² was introduced in January 2004. The transformation is not literally identical to the text of the Invoice Directive but the regulations in the German Acts are in accordance with the Directive.

The EU Invoicing Directive (2001/115/EG) establishes mandatory items of information that must be included on every invoice. The following conditions are implied in 14 IV, 14a, 15 German Value Added Tax Act ⁷³ and §§ 33, 34 Value Added Tax Implementing Order⁷⁴.

Invoices (total amount above 100.00 EUR):

- the supplier's full name and address

⁷⁰ view of national expert Atty. Klaus M. Brisch LL.M., Graf von Westphalen Bappert & Modest Law Offices

⁷¹ Art. 5 and 6 of the „Zweites Gesetz zur Änderung steuerlicher Vorschriften“ or „Steueränderungsgesetz 2003 – StÄndG 2003“

⁷² Steueränderungsgesetz (StÄndG)

⁷³ Umsatzsteuergesetz (UStG)

⁷⁴ Umsatzsteuer-Durchführungsverordnung (UStDV)

- the customer's full name and address
- the date of issue
- a description of the quantity and nature of the goods supplied or services rendered
- the date of the supply or payment (if different from the date of supply)
- the unit price of the goods or services exclusive of tax, discounts or rebates (unless included in the unit price)
- a break-down of the VAT amount payable per VAT rate or exemption
- gross amount
- the VAT rate applied
- the supplier's VAT identification number
- sequential number that uniquely identifies the invoice.

It is not required that invoices are personally signed. The legal status of an electronic invoice is equal to an invoice on paper if the recipient agrees with the electronic invoice procedure. The requirements on such an agreement are not very high. The invoicing party can assume the agreement in a general agreement or in standard form contracts or the addressee can agree tacitly through practising.

For proof of authenticity and integrity of the source the Value Added Tax Act demands a qualified electronic signature with or without accreditation⁷⁵ or Electronic Data Interchange (EDI).⁷⁶

Transmissions of invoices via facsimile or email have to be printed out on paper and archived for ten years.⁷⁷ These only include transmissions from fax machine to fax machine. Transmissions from fax machine to computer fax need to be signed with a qualified digital signature.

Invoices can be archived e.g. on microfilms, discs, CD-ROM, magnetic tape according to § 147 II General Fiscal Law⁷⁸ but the procedure has to follow adequate and orderly accounting principles and needs to be verifiable by the finance office within reasonable time.⁷⁹ The original invoices do not need to be kept.⁸⁰ Several e-invoices can be summarized on one data file and can be transmitted to the recipient with only one qualified e-signature. There is also the possibility of transmitting one invoice via EDI, if a collective invoice

⁷⁵ § 14 III Nr. 1 UStG

⁷⁶ § 14 III Nr. 2 UStG

⁷⁷ § 14 b I UStG

⁷⁸ Abgabenordnung (AO)

⁷⁹ § 145 AO

⁸⁰ § 255 II UStG; Compare also Grundsätze DV-gestützter Buchführungssysteme – GoBS (Anlage zum BMF-Schreiben vom 7. Nov. 1995 – BStBl I S. 738); http://www.bundesfinanzministerium.de/lang_de/DE/Service/Downloads/Abt_IV/BMF_Schreiben/015,templateId=raw,property=publicationFile.pdf

in paper or in electronic form (with at least a qualified electronic signature) will be sent additionally.⁸¹

Several deliveries or services can be summarized periodically in one invoice.⁸² Missing details have to be provided as supplementary documents.⁸³

It is allowed to have electronic computer operations with participants in another member state, invoices however need to be archived in the member territories. The entrepreneur is obligated to keep the invoices or electronic data in a way so that he is able to provide the information to the finance department at any time. An entrepreneur beyond EU territory, who is obligated to keep the invoices in the country of residence, has to store copies of these invoices in an EU member state.⁸⁴

Most e-payment transactions today are done by credit card with SSL-coding or authentication as well as online bank transactions. Fewer transactions are done via Paypal, Firstgate, PaySafeCard, T-Pay, Micromoney or other systems.

According to the German Civil Code the payment with a credit card does not fulfil the contract. The action of payment is done *instead* of fulfilling the contract.⁸⁵

In the case of misuse protection is provided by the law. § 676 h German Civil Code in accordance with Art. 8 Directive 1997/7/EC and Art. 8 Directive 2002/65/EC hinders the payment card provider to demand compensation if a card has been misused without knowledge and wrongdoing by the card holder. § 676 h is not limited to distance selling contracts.

The business which has accepted the credit card payment from a customer has a claim against the business issuing the credit card and against the customer who paid with the credit card. In a dispute the business issuing the credit card has to prove that an order of transaction was given. It can only deny further payment to the business which accepted the credit card if it can prove a contract violation by the customer.⁸⁶

Contract clauses often contain a limited liability by the card holder. Examples are a liability until the point in time when the card holder reports the loss of the card and up to a certain amount, for instance 50.00 EUR.

⁸¹ § 14 III Nr. 2 UStG

⁸² §§ 14 IV, 14a UStG

⁸³ § 31 I UStDV

⁸⁴ § 1 III UStG

⁸⁵ § 364 II BGB

⁸⁶ § 676h BGB

In the past a rising number of cases was reported in which fake emails were sent to consumers asking for personal data or redirecting customers of financial institutes to fake websites in order to gain access to the customers' accounts and ID data.

Furthermore, cases were reported in which hackers gained access to certain banks' data files or were able to transfer money.

Therefore, a number of consumers still feel reluctant to use their payment card online due to fear of misuse.

The Federal Consumer Association however sees a main problem in the limited ways of payment offered by the shops. While credit cards are often the only possible way payment made by direct debit and cash on delivery are seldomly offered.⁸⁷

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

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

Directive 1999/44/EC was given great attention as the implementation was part of a major restructuring project of vital parts of the German Civil Code implemented through the Law of Obligations Modernization Act.

In case of non-delivery the buyer may ask for compensation or reimbursement of costs deriving out of the failure to deliver (on time) (§ 440 in connection with §§ 280 ff. German Civil Code).

The purchaser may demand performance within a certain time period and after such time period has passed refrain from the contract. He may refrain from the contract right away if a certain time of delivery was agreed upon, if the seller declares that he will not deliver anymore or if circumstances would suggest that the buyer may refrain from the contract right away.⁸⁸

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

The time of the right of withdrawal is limited to 14 days according to § 355 I 2 German Civil Code and therefore in accordance with Art 6 Directive 1997/7/EC. According to the Distance Financial Services Act⁸⁹ implementing Directive 2002/65/EC, amended by the Changes of Financial Services Distance Selling Act of December 2004⁹⁰, introducing § 48 c Insurance Contract Act⁹¹ for contracts the time of withdrawal for distance selling financial services contracts is also 14

⁸⁷ view of national expert Christian Fronczak, Federal Consumer Association (VZPV)

⁸⁸ Compare §§ 280, 286, 323 BGB

⁸⁹ Fern-Finanzdienstleistungsgesetz; <http://www.fma.gv.at/de/pdf/fernfinng.pdf>

⁹⁰ Gesetzes zur Änderung der Vorschriften über Fernabsatzverträge bei Finanzdienstleistungen from 2.12.2004;

<http://www.bundestag.de/bundestag/btgb/btgb104/btgb104.pdf>
<http://www.gesetze-im-internet.de/bundesrecht/vvg/gesamt.pdf>

calendar days. With regard to life insurances (in accordance with Directive 2002/83/EC) distance financial services regarding pension funds for single persons the time limit is 30 days.

A consumer may express his wish of withdrawal by sending back the goods or by informing the business in text form. The consumer needs to be informed about this right also in text form, name and address of the business and about time limit. If no information was given to the consumer the time limit of withdrawal from contract will be six months.⁹² The German law expands the time of withdrawal in comparison to the Directive as § 312 c II German Civil Code allows for 6 months if information obligations are not met. The limitation also will not come into effect if the right of withdrawal was not even mentioned.

If the consumer withdraws from the contract he is obliged to return the goods. The business will carry the costs of returning the goods.⁹³ In some cases terms stating that the consumer has to carry the return costs may be valid (e.g. if the price of the goods is below 40.00 EUR or no money was transferred until the time of withdrawal).

If the consumer uses the item purchased he is liable for any defects which may result out of using the product in a more than for the test appropriate manner. § 357 III 1,2 German Civil Code therefore limits the consumer testing the item and therefore may not be in accordance with the Directive which does not want to burden the consumer with the risks of limited information before closing the deal.

The consumer is obliged to pay for any loss in value due to normal use. This does not include testing. The business has to inform the consumer in text form about how to test the product without a loss in value until the conclusion of contract. In almost all cases the business will send an email to the customer to confirm the order placed with the business. In order to comply with the law this email should contain the required information. The business may also indicate a link leading to the information. The business would have to prove that such information was given to and received by the consumer. On websites the consumer may also be asked to confirm that he was informed about his rights by clicking a button which then can be proved using the logfiles.

4.1.1.3 Delivery of a good not in conformity with the contract

In accordance with Art. 2 I of the Directive § 433 I 2 German Civil Code considers the duty to deliver without defect as one of the main duties of the contract.

Those rights arising out of a defective item are defined in § 437 referring to §§ 439 and 441 German Civil Code in accordance with Art. 3. The buyer has the right to demand correction free of charge

⁹² § 355 II BGB

⁹³ § 357 II BGB

(§ 439 German Civil Code) or reduction of price (§ 441 German Civil Code) or he may refrain from the contract (§ 437 Nr. 2 German Civil Code). In addition he may ask for compensation or reimbursement of costs deriving out of the failure to deliver in conformity with the contract (§§ 440 in connection with §§ 280 ff. or § 284 German Civil Code).

The right to refrain from the contract demands that the buyer has given the seller the possibility to correct his mistake within a certain amount of time (§ 323 I German Civil Code). Depending on the circumstances setting a time limit for correction may not be necessary.⁹⁴

The „last seller“ may ask for reimbursement from his provider, §§ 478, 479 German Civil Code in accordance with Art. 4.

In most cases the time limit to execute these rights is 2 years, § 438 I Nr. 3 German Civil Code in accordance with Art. 5.

Liability is excluded if the buyer knew of the defect, § 442 II German Civil Code in accordance with Art. 2 III.

A regulation regarding guarantees has been introduced with § 443 German Civil Code in accordance with Art. 6 I.

4.2 Cross border regulatory issues

During the research no court rulings on electronic invoicing or payment related to execution of cross-border electronic contracts were found.

⁹⁴ Leible, Zivilrecht unter europäischem Einfluss, Gebauer/Wiedmann, 2005, p. 382

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

The following main legal and administrative barriers to e-business in Germany have been identified:

1. Legal uncertainty of legal effectiveness and recognition of e-business documents in national trade relations

The German civil law tradition means that written legislation forms the most important source of law. The specific legal effectiveness and recognition of e-business documents in national trade are regulated by a number of laws. Court decisions represent an important source of law in the field of e-business. As the number of decided cases in the fields of e-signatures, e-contract conclusion and e-invoicing is still comparably small administrative bodies and enterprises may be left uncertain about the exact legal status of electronic business documents in general.

2. Legal and administrative barriers to cross-border exchange of electronic signatures and electronic contracts

While accreditation is open for any provider of qualified e-signatures costs and time-consuming procedures may keep foreign certification-service-providers from getting accredited. Furthermore, e-business may very well rely on other forms of signatures as the qualified certificates demand the use of technical hardware and are therefore considered impractical compared to solutions with PIN/TAN procedures.

Different time limits to withdraw from a contract within the member countries pose a difficulty to businesses which service consumers across borders. A single binding time limit in all member states would be preferable.⁹⁵

3. Compliance problems for online shops

Surveys on online shops have been showing a general lack of awareness among enterprises about the applicable rules as a main cause of problems as well as a lack of trust by the consumers.

A survey by the Federal Consumer Association in 2002 showed seven out of ten providers of services and products failing to comply with the legal obligations. Most often providers did not offer complete contact data, information about the right of withdrawal, information about the use of data.⁹⁶

⁹⁵ view of national expert Atty. Klaus M. Brisch LL.M., Graf von Westphalen Bappert & Modest Law Offices

⁹⁶ http://www.vzbv.de/mediapics/dossier_internet_08_03_2005.pdf

The European Consumer Center in 2003 found in 114 buys that only 57 per cent were correctly answered and billed. 8 per cent of the billed items were never delivered⁹⁷.

In a study by the Postbank/Europressedienst in 2004 9.6 per cent of Germans polled said they had never received the ordered items, 2.2 per cent had their credit card data misused and 16.8 per cent were not able to return the items within the allowed time limit.⁹⁸

Businesses on the other hand state that the information obligations presented in the EU Directives and in the German laws are quite extensive. Since in Germany regulations are spread across a number of Acts they are viewed as being contra productive to the development of e-commerce.⁹⁹

As many smaller businesses do not invest in legal support they do not have the knowledge to comply exactly with the information obligations and therefore carry the risk of being penalized or delivering goods or services on the basis of contracts which could be challenged by the customer at any time.

Experts estimate that at least 50 per cent of the businesses do not comply with the information obligations.¹⁰⁰

While businesses argue that the consumer does not take notice of such large information packages unless he wants to challenge a contract and it therefore would be preferable to provide most of the information, for instance about the possibility to withdraw from the contract in due time and further explanation regarding such a withdrawal, at the time of delivery of the product, consumer associations point out that businesses need to present the information in a different manner. The Federal Consumer Association for instance sees as a main problem that general terms of agreement are often hidden and consumer-unfriendly.¹⁰¹

The more information needs to be provided the harder it may be to present the information. This problem may become even more obvious when mobile business will pick up as the information would need to be displayed on small screens. As described earlier though, courts have already made clear that small letter writing may not be sufficient presentation of consumer information.

⁹⁷ http://www.vzbv.de/mediapics/dossier_internet_08_03_2005.pdf

⁹⁸ Postbank/Europressedienst 2004, p. 30,
http://www.vzbv.de/mediapics/dossier_internet_08_03_2005.pdf

⁹⁹ view of national expert Dr. Kai Kuhlmann, Association for Information Economy, Telecommunication and New Media (BITKOM)

¹⁰⁰ view of national expert Dr. Kai Kuhlmann, Association for Information Economy, Telecommunication and New Media (BITKOM)

¹⁰¹ view of national expert Christian Froncyak, Federal Consumer Association (VZPV)

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

The awareness about national authorities in charge of solving legal problems in e-business amongst consumers and businesses has not been subject to a particular study.

E-Commerce has a great potential. 34.4 million Germans were using the internet in 2004 with 80 per cent as home users. 23 million Germans already buy online with books coming first, then entertainment tickets, music, and software.

Trust however is still relatively low due to reports about fraud and illegal access to personal data. Consumers have a difficult time evaluating the risk of online transactions as the technical and the legal aspects of e-commerce are very complex and hard to understand.

According to the Federal Consumer Association the best approach would be to inform consumers and providers of products and services about duties and rights. Furthermore the association demands an active improvement of the presentation of obligatory information like the general terms of contract.¹⁰²

5.3 Legal and administrative best practices in e-business

The following legal and administrative best practices in Germany are:

1. Signature Alliance and Germany Online

In an effort to boost the distribution of chip cards which could carry the digital signature chips and to further develop those services mentioned in the BundOnline 2005 strategic paper, the "Signature Alliance", was founded. Partners of this alliance are the Federal Ministry of the Interior (BMI), the Federal Ministry of Economics and Technology as well as those institutions which are able to distribute such chip cards, in particular banks.¹⁰³

The latest attempt to provide chip cards which could be used for digital signatures is the government's so called "e-card strategy".¹⁰⁴ Upcoming card projects on a federal level such as the electronic health card, the digital passport and the job card as well as the electronic tax declaration process shall be coordinated.

On a federal, state and municipality level various projects have been conducted in order to develop government-to-citizen and government-to-business applications. The main initiative to introduce e-government activities and applications has been Bund Online 2005

¹⁰² http://www.vzbv.de/mediapics/dossier_internet_08_03_2005.pdf

¹⁰³ <http://www.signaturbuendnis.de/>

¹⁰⁴ Compare http://www.bmbf.de/pub/aktionsprogramm_2006_gb.pdf

followed by Germany (Deutschland) Online (listing all current e-government activities in Germany)¹⁰⁵.

2. Using private seals of approval to increase customer trust

Seals of approval (offered for instance by the company Trusted Shops) are increasingly being used and accepted by the consumer in order to identify secure online shops.¹⁰⁶ Even though they are a private service rather than an administrative best practice such certificates offer a practical solution if accepted by the market.

Connected with a money-back-guarantee such certificates are believed to have an increasing effect on consumer trust. The market itself may therefore force businesses to comply with the requirements of such certification services demanded by the customers.

¹⁰⁵ <http://www.deutschland-online.de/>; compare article <http://www.jurpc.de/aufsatz/20060024.htm>

¹⁰⁶ <http://www.trustedshops.de/de/trustedshops/index.html>

ANNEX 1: Interviews performed

- Atty. Klaus M. Brisch LL.M., Graf von Westphalen Bappert & Modest Law Offices
- Christian Froncyak, Federal Consumer Association (VZPV)
- Dipl.-Jur. Claas Hanken, Information Management Institute (ifib)
- Dr. Kai Kuhlmann, Association for Information Economy, Telecommunication and New Media (BITKOM)

ANNEX 2: E-business national legislation

The regulatory framework for e-business in Germany is based on the Signature Act¹⁰⁷, the Law governing Framework Conditions for electronic Signatures and Amending other regulation¹⁰⁸, §§ 312 ff. of the German Civil Code¹⁰⁹, German Civil Code Information Obligation Regulation¹¹⁰, the Teleservices Act¹¹¹, and the Mediaservices State Contract¹¹²

These laws are supplemented by further regulations of the German Civil Code, the German Value Added Tax Act¹¹³, the Value Added Tax Implementing Order¹¹⁴, the Insurance Contract Act¹¹⁵, and the Quotation of Prices Regulation¹¹⁶.

¹⁰⁷ Signaturgesetz (SigG); http://bundesrecht.juris.de/sigg_2001/

¹⁰⁸ Official Journal – Bundesgesetzblatt – BGBl. Teil I vom 21. Mai 2001; 217.160.60.235/BGBl/bgbl1f/b101021f.pdf

¹⁰⁹ Bürgerliches Gesetzbuch; <http://bundesrecht.juris.de/bundesrecht/bgb/gesamt.pdf>

¹¹⁰ BGB-Informationspflichten-Verordnung; <http://bundesrecht.juris.de/bundesrecht/bgb-infov/gesamt.pdf>

¹¹¹ Teledienstegesetz; <http://www.gesetze-im-internet.de/tdg/>

¹¹² Mediendienstestaatsvertrag (MDStV); www.uni-stuttgart.de/impressum/mdstv.pdf

¹¹³ Umsatzsteuergesetz (UStG); http://www.gesetze-im-internet.de/bundesrecht/ustg_1980/gesamt.pdf

¹¹⁴ Umsatzsteuer-Durchführungsverordnung (UStDV); http://www.gesetze-im-internet.de/bundesrecht/ustdv_1980/gesamt.pdf

¹¹⁵ Gesetz für Versicherungsverträge (VVG); <http://www.gesetze-im-internet.de/bundesrecht/vvg/gesamt.pdf>

¹¹⁶ Preisangabenverordnung, BGBl I 1985, p. 580