

The European Union Model Interoperability Agreement for Electronic Business Documents

By Phillip Schmandt*

INTRODUCTION

On February 15, 2012, the European Committee for Standardization (commonly referred to by its French acronym “CEN”)¹ approved the Model Interoperability Agreement for Transmission and Processing of Electronic Invoices and Other Business Documents (“Model Interoperability Agreement”).²

The Model Interoperability Agreement compliments the Model Trading Partner Agreement approved by both the European Commission and the American Bar Association in 1995.³ However, while the Model Trading Partner Agreement was focused on electronic data interchange (“EDI”), the new Model Interoperability Agreement anticipates the exchange of documents that are written in Extensible Markup Language (“XML”). XML is a computer language that defines a set of rules for encoding documents in a format that is both human-readable and machine-readable.⁴ When prepared with XML, the exchanged documents can be automatically read by each of the trading parties’ computer systems and integrated into their financial and other systems, thereby introducing significant efficiencies.⁵

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1. Comité Européen de Normalisation.

2. EUR. COMM. FOR STANDARDIZATION, MODEL INTEROPERABILITY AGREEMENT FOR TRANSMISSION AND PROCESSING OF ELECTRONIC INVOICES AND OTHER BUSINESS DOCUMENTS (May 2012) [hereinafter MODEL INTEROPERABILITY AGREEMENT], available at <ftp://ftp.cen.eu/CEN/Sectors/List/ICT/CWAs/CWA16464-2.pdf>.

3. See Elec. Messaging Servs. Task Force, *The Commercial Use of Electronic Data Interchange: A Report and Model Trading Agreement*, 45 BUS. LAW. 1645 (1990); Commission Recommendation (EC) No. 820/1994 of 19 Oct. 1994, Relating to the Legal Aspects of Electronic Data Interchange, 1994 O.J. (L 338) 98, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1994:338:0098:0117:EN:PDF>.

4. Adrian Stevenson, *How to Find a Needle in a Haystack*, INSTITUTIONAL WEB MGMT. WORKSHOP, at 21 (July 6, 2005), <http://www.slideshare.net/adrianstevenson/how-to-find-a-needle-in-the-haystack>.

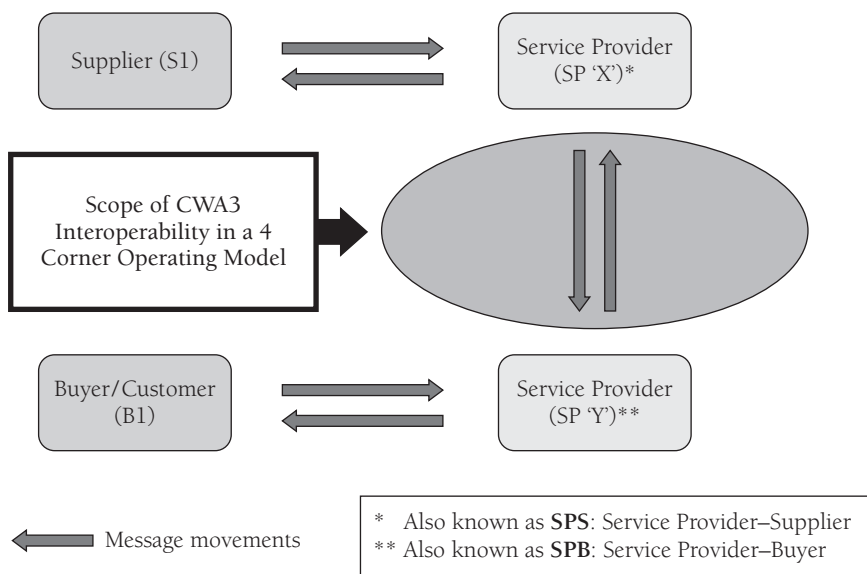
5. *European Commission Wants Broad Scale Adoption of e-Invoicing by 2020*, E-INVOICING PLATFORM, at 1 (Dec. 2, 2010), <http://eeiplatform.com/3374/european-commission-wants-broad-scale-adoption-of-e-invoicing-by-2020/>.

The Model Interoperability Agreement is intended to facilitate the exchange of all electronic documents in the procurement to pay cycle, including purchase orders, change orders, invoices, and invoice acknowledgements.⁶ Because of unique requirements in the European Union regarding the use of electronic invoices, the Model Interoperability Agreement pays particular attention to invoices, but anticipates that it will govern the exchange of all electronic business documents desired to be exchanged by the trading partners.⁷

WHAT IS INTEROPERABILITY?

The authors of the Model Interoperability Agreement recognized that the term “interoperability” is susceptible to many meanings.⁸ In a companion document published simultaneously to explain the Model Interoperability Agreement, CEN reviewed a variety of definitions of “interoperability” that had been used in the past, but noted that for purposes of the Model Interoperability Agreement the term interoperability was intended to mean only the following:

While recognizing there are several layers of interoperability, the scope for interoperability addressed in this document is limited to the area of transmission and processing between service providers acting for the trading parties in relation to the transmission and processing of e-Invoices and other electronic business documents as depicted in the diagram below⁹:



6. MODEL INTEROPERABILITY AGREEMENT, *supra* note 2, app. 1, at 37.

7. *Id.*

8. EUR. COMM. FOR STANDARDIZATION, CONFORMANCE CRITERIA FOR INTEROPERABILITY BETWEEN ELECTRONIC INVOICING SERVICES § 1.2, at 6–7 (May 2012) [hereinafter CONFORMANCE CRITERIA], available at [ftp://ftp.cen.eu/CEN/Sectors/List/ICT/CWAs/CWA16464-3.pdf](http://ftp.cen.eu/CEN/Sectors/List/ICT/CWAs/CWA16464-3.pdf).

9. *Id.*

Therefore, the “interoperability” envisioned by the Model Interoperability Agreement is similar to common notions of interoperability in the cell phone industry. Each cell phone user may have his or her own carrier and the two carriers have an agreement on how the transmissions are relayed and how the costs are allocated. Similarly, with electronic documents, if each of the trading partners has its own service provider that assists in preparing and formatting the electronic documents, then the Model Interoperability Agreement governs the allocation of responsibilities among those two service providers.¹⁰ With one key exception discussed below relating to confidentiality, the Model Interoperability Agreement governs only the relationship between service providers and does not govern the relationship between those service providers and their (or the other service provider’s) customer(s).¹¹

When each trading partner has its own service provider, the relationship is referred to as a “four corner” relationship.¹² This contrasts with the situation where each trading partner uses the same service provider (such as a web portal), which is referred to as a “three corner” model or a direct bilateral transmission of documents between trading partners (two corner model).¹³ The Model Interoperability Agreement is designed for a four corner model, but many of its principles could be applied in a three or two corner model.¹⁴

SCOPE OF MODEL INTEROPERABILITY AGREEMENT

Section 2.1 of the Model Interoperability Agreement defines its scope as follows:

The Agreement sets out the terms and conditions for the transmission and processing of e-Invoices and other Electronic Business Documents between the Parties for the purpose that their respective Customers, whether a Sender or a Receiver, shall be able to exchange these documents between each other automatically and without manual intervention. The e-Invoices and Electronic Business Documents to be exchanged and such other services as might be mutually agreed will be specified in the Description of Services. Either or both of SP-X or SP-Y [the two service providers] may act in the capacity of Sending Party and Receiving Party when performing Services under this Agreement.¹⁵

To make clear that both service providers could be either initiating or receiving a transmission of electronic documents, the Model Interoperability Agreement assigned them the nomenclature of SP-X and SP-Y and specifically avoided the

10. MODEL INTEROPERABILITY AGREEMENT, *supra* note 2, at 5 (Preamble).

11. *Id.* “The Parties’ relationship with their respective Customers is not regulated and is out of the scope of this Agreement, except as expressly provided in Section 13.7.” *Id.* § 3.1, at 6.

12. EUR. COMM. FOR STANDARDIZATION, CODE OF PRACTICE FOR ELECTRONIC INVOICING IN THE EU 12 (May 2012) [hereinafter CODE OF PRACTICE], available at <ftp://ftp.cen.eu/CEN/Sectors/List/ICT/CWAs/CWA16463.pdf>.

13. *Id.*

14. See, e.g., MODEL INTEROPERABILITY AGREEMENT, *supra* note 2, § 4, at 7 (Definitions); *id.* § 6, at 10 (Services, Warranty and Service Levels); *id.* § 8, at 12 (Legal and VAT Compliance for e-Invoices); *id.* § 13, at 15 (Confidentiality and Data Protection); *id.* § 16, at 20 (Ownership and Cross License of Data; Intellectual Property Rights); see also CONFORMANCE CRITERIA, *supra* note 8, at 8.

15. MODEL INTEROPERABILITY AGREEMENT, *supra* note 2, § 2.1, at 6.

terminology of “SP-1” and “SP-2” to minimize any perception that any one service provider’s action would always precede the other.¹⁶

DESCRIPTION OF SERVICES APPENDIX

The Model Interoperability Agreement contains an appendix that specifies the more technical aspects of the transmissions, which is labeled a “Description of Services.”¹⁷ This includes such items as the specification of the transport, routing and packaging protocol, the message enveloping and syntax, and what type of acknowledgment will be delivered.¹⁸

The Appendix serves as a useful checklist for technical issues to be considered whenever sending electronic documents, even for trading partners exchanging them directly without service providers.¹⁹ There are numerous requirements to consider before exchanging documents electronically in a reliable fashion that do not arise in other circumstances, such as the maximum file size, how attachments are handled, and any field requirements, such as maximum number of characters.²⁰ Failure to anticipate and reach agreement on these details may result in loss of messages or other transmission failures.²¹

DEFINING RECEIPT OF A DOCUMENT

The technical aspects of the Description of Services Appendix are woven into the body of the Model Interoperability Agreement and given substantive effect. For example, the definition of when a party receives an electronic document incorporates the requirement that the document was transmitted in accordance with the Description of Services:

The e-Invoices and Electronic Business Documents that are identified in the Description of Services are deemed to have been transferred to the Receiving Party when the Message containing an e-Invoice or Electronic Business Document is made available to the Receiving Party’s system in accordance with the Description of Services and the Sending Party has received a Technical Acknowledgment of receipt. Prior to such receipt, responsibility for the e-Invoice or Electronic Business Document remains with the Sending Party.²²

Therefore, in order to be able to claim the other party received the document in question, the document must have been transmitted in accordance with the Description of Services.²³

16. *Id.* § 1.1, at 6.

17. *Id.* app. 1, at 27.

18. *Id.* app. 1, at 28–29.

19. *Id.*

20. *Id.*

21. EUR. COMM. FOR STANDARDIZATION, E-INVOICING COMPLIANCE GUIDELINES—COMMENTARY TO THE COMPLIANCE MATRIX 32 (Dec. 2009), available at <ftp://ftp.cen.eu/PUBLIC/CWAs/eInV2/CWA%2016047.pdf>.

22. MODEL INTEROPERABILITY AGREEMENT, *supra* note 2, § 5.3, at 9.

23. *Id.*

CREATING A TRUSTED FRAMEWORK

One of the motivations behind the creation of the Model Interoperability Agreement was to accelerate the uptake of electronic invoicing and exchange of electronic documents.²⁴ While the agreement was aimed at electronic invoicing in the European Union, many of its principles are universal.²⁵ The authors understood that one of the major inhibitors to sending electronic documents is uncertainty by trading partners regarding the security and confidentiality of their transmissions, especially when those documents are handled by service providers they did not select and who owe them no duties.²⁶ Trading partners are unlikely to agree to allow another party's service provider to handle their data and view their commercial transactions unless that service provider has made certain assurances regarding how they can use that data.²⁷

Therefore, the Model Interoperability Agreement contains numerous provisions that are intended to protect the trading partners, even though the trading partners are not a party to the agreement.²⁸ Those provisions address the issues and concepts described below.

Confidentiality. The Model Interoperability Agreement contains a fairly typical form of confidentiality agreement, in recognition that the networks will be exchanging pricing and other trade secrets of the trading partners, which the trading partners will expect to remain confidential. The relevant provision is Section 13.1, which provides as follows:

Section 13.1—Confidential Information; Limited Disclosure

The Parties undertake to keep confidential the content of the Agreement, the e-Invoices, Electronic Business Documents and Data, together with all technical, commercial or financial information relating to the other Party, its operations or its Customer that comes to their knowledge. The Parties may, however, disclose to their Customers in general terms that the Agreement exists and include the other Party in a list of entities with whom the Party has interoperability agreements. The Parties may disclose e-Invoices, Electronic Business Documents and their associated Data to such Party's Customer who is the sender or recipient of the e-Invoice or Electronic Business Document. The Parties undertake not to disclose the confidential

24. *Id.* at 5 (Introduction).

25. CONFORMANCE CRITERIA, *supra* note 8, at 8.

26. See, e.g., *Industry Standards for e-Marketplace Participation Agreements*, NAT'L ASS'N OF WHOLESALE DISTRIBUTORS (Aug. 2001) (on file with *The Business Lawyer*); *Good Trading Practices in Electronic Bidding Processes: Reverse Auctions*, ALUMINUM FOIL CONTAINER MANUFACTURERS ASS'N (Nov. 2000), <http://www.afcma.org/uploads/downloads/AFCMARReverseAuctionPolicy.pdf>; see also *NAW Proposes Standards For e-Market Agreements*, MODERN DISTRIBUTION MGMT. (Aug. 10, 2001), <http://www.mdm.com/NAW-proposes-standards-for-e-market-agreements/PARAMS/article/1147>.

27. See *supra* note 26.

28. The concept of a trusted framework relates back to recommendations made by the European Union's Expert Group on electronic invoicing. See FINAL REPORT OF THE EXPERT GROUP ON E-INVOICING 7 (Nov. 2009), available at http://ec.europa.eu/internal_market/consultations/docs/2009/e-invoicing/report_en.pdf (stating at Recommendation 1.5: "The Expert Group recommends to develop and maintain a competitive and trusted market place for services and solutions and assure trustworthiness and data protection.").

information referred to above to a third party without a prior written consent from the other Party. If it is necessary for a Party to give its employees or advisers information that is subject to confidentiality, the information may not be disclosed to other persons than those for whom it is necessary to receive such information and who are bound by a confidentiality undertaking either by agreement or by law.²⁹

In the portions of the Model Interoperability Agreement governing limits on liabilities, the breach of the confidentiality provision is expressly excluded from any limit on liability and each service provider agrees to accept direct liability to the other service provider's customers even though there is no privity of contract with that customer.³⁰ This deviates from the general rule of the Model Interoperability Agreement that each service provider only incurs responsibilities and owes duties to its own customers and not the other service provider's customers.³¹

Aggregation of Data. The Model Interoperability Agreement goes one step further than a standard confidentiality clause, however, in recognition that the trading partners own the underlying data. While some confidentiality clauses allow disclosure of information so long as it does not identify a trading partner, the Model Interoperability Agreement bars the disclosure or re-use of the data even in "anonymized" form that does not identify the trading partner. This is because of the fact that the service providers will be handling significant commercial data that can be "data mined" or analyzed easily when in electronic format. Because the trading partners own that data, the networks agree not to make commercial use of the data, or reports based on the data, without the consent of both trading partners. The Model Interoperability Agreement does, however, permit the use of very high levels of aggregated data, so the service providers can, for example, report on the total volume of transactions they handle in a given period of time. The relevant provision is Section 13.2, which provides as follows:

Section 13.2—Limited Use and Disclosure of Data

Each Party agrees not to sell or make commercial use of Data it handles, transmits or stores under this Agreement, except in furtherance of the Services as permitted by this Agreement. The obligations of confidentiality and restrictions on use of Data in this Agreement apply to Data even if it is in anonymous or aggregated form and any works derived from the Data. Notwithstanding the foregoing, each Party may disclose aggregated Data based on all or substantially all of the transmissions it handles during a time period for the purpose of advertising the total volume of transactions or spending handled by its systems during that time period, so long as pricing or other competitively sensitive information of the Customers is not disclosed.³²

29. MODEL INTEROPERABILITY AGREEMENT, *supra* note 2, § 13.1, at 15–16.

30. *Id.* § 14.6, at 19.

31. *Id.* § 3.1, at 6.

32. *Id.* § 13.2, at 16.

This provision was intended to protect the trading partner's data, while allowing the service providers flexibility to advertise the total volume of data they handle on an aggregated basis.³³

Data License. The Model Interoperability Agreement is structured on the basis that the service providers receive only a limited license to use the trading partner's data. This is intended to provide further protection to trading partners who may be concerned what other uses service providers may make of their data. The relevant provision is Section 16.1, which provides as follows:

Section 16.1—Limited License; No Decompilation

Upon transmission of any Data to a Party by another Party, such Party is thereby granted a revocable, non-exclusive, non-transferable, worldwide, limited license to use the Data in accordance with this Agreement for the sole purposes of performing the Services. In exercising such license, a Party may not use or employ Data for any other purpose or for the benefit of any other party other than Sender and Receiver. A Party may not decompile, disassemble or otherwise reverse engineer the Data or allow any third party to frame or link to the Data.³⁴

By structuring the relationship as a license to use the data that is limited to performing the services, any unauthorized use of the data beyond the license terms may, depending on the jurisdiction, create a potential basis for statutory claims against the breaching party for unauthorized access to data or circumventing access controls on the data.³⁵

Ownership of Data. Ownership of data is governed by Section 16.2 of the Model Interoperability Agreement, which provides as follows:

Section 16.2—Rights to Data

The Sender and Receiver, jointly or individually, as applicable, retain all rights, title and ownership in the Data and any works derived from the Data. All intellectual property rights associated with the Data, including trade secrets, are retained by the Sender and Receiver, except the limited license to use the Data in performing the Services. Neither the delivery of Data to the Party, nor the conversion of Data by the Party, nor anything else in this Agreement transfers to either Party any ownership or other interest in such Data or any product, device, design, service, process, secret, trademark or anything else described or contained in Data, other than the limited license rights to use the Data as expressly provided in this Agreement.³⁶

This provision is intended to provide assurances to each of the ultimate trading partners that no service provider that transmits its data, or any successor of such service provider (such as a bankruptcy trustee), will ever have a basis to claim an ownership interest in the data.³⁷

33. *Id.*

34. *Id.* § 16.1, at 20.

35. See, e.g., *Real Networks, Inc. v. DVD Copy Control Ass'n*, 641 F. Supp. 2d 913 (N.D. Cal. 2009).

36. MODEL INTEROPERABILITY AGREEMENT, *supra* note 2, § 16.2, at 20–21.

37. *Id.*

Limits on Fees. The Model Interoperability Agreement addresses fees that may be charged by service providers to the other service provider or that service provider's customers in Section 10.2 (the Model Interoperability Agreement does not address the fees a service provider may charge its own customer):

Section 10.2—No Set Up or Professional Fees

Parties carry all their own costs including development and implementation of the Interoperability Services as well as all on-going maintenance and other costs required during the use of the Interoperability Services.

Optional Per Transaction Fees

Any per transaction fees for the Services are set forth in Appendix 1, provided that each Party agrees not to assess to the other Party expenses that are attributable to such Party's own Customers.³⁸

This provision is intended to prevent against hidden fees to trading partners by service providers the trading partner did not select.³⁹ Any fees that one service provider passes on to the other (and which can be expected to be passed on to the trading partner) must be disclosed and agreed to up front.⁴⁰ Otherwise, each service provider is responsible for collecting all fees from its own customers—those fees are not regulated or affected by the Model Interoperability Agreement.⁴¹

RELATIONSHIP TO OTHER DEVELOPMENTS IN THE EUROPEAN UNION REGARDING ELECTRONIC INVOICING

In July 2010 the European Commission passed "Council Directive 2010/45/EU amending Directive 2006/112/EC on the common system of value added tax as regards the rules of invoicing."⁴² The new VAT Directive has the potential to change substantially how electronic commerce and electronic invoicing is performed in the European Union.⁴³ The member states have until January 1, 2013 to implement national legislation consistent with that new Directive.⁴⁴

Under both the new and the old VAT Directive, electronic invoices may be used so long as the authenticity of the origin (the identity of the sender) and the integrity of the content (no one has altered the invoice in transmission) is demonstrated.⁴⁵ The old Directive authorized only two specific technological

38. *Id.* § 10.2, at 14.

39. *Id.*

40. *Id.*

41. *Id.*

42. Council Directive 2010/45/EU, Amending Directive 2006/112/EC on the Common System of Value Added Tax as Regards the Rules on Invoicing, 2010 O.J. (L 189) 1 (EU) [hereinafter VAT Directive], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:189:0001:0008:EN:PDF>.

43. *Reaping the Benefits of Electronic Invoicing in the European Union*, COM (2010) 712 final (Dec. 2, 2010), available at http://ec.europa.eu/enterprise/sectors/ict/files/com712_en.pdf.

44. VAT Directive, *supra* note 42, art. 2, § 1, at 8.

45. Compare Council Directive 2010/45/EU, *supra* note 42, art. 233, at 30, with Council Directive 2006/112, art. 233, on the Common System of Value Added Tax, 2006 O.J. (L 347) 1 (EC) [here-

methods of ensuring authenticity of origin and integrity of content: electronic signatures or EDI.⁴⁶ The old Directive also allowed member states to permit “other means” to ensure authenticity of origin and integrity of content, but there was little agreement—and much confusion—on what “other means” meant.⁴⁷ The new Directive opens the door to a third means, which is the use of “business controls.”⁴⁸ The business controls used for electronic invoices are intended to be the same as the business controls used for paper, but much discussion remains on how exactly business controls will be applied to electronic invoicing.⁴⁹

In December 2010, the European Commission published a document titled *Reaping the Benefits of Electronic Invoicing in the European Union*, which called upon CEN to publish a Code of Practice for electronic invoicing.⁵⁰ That Code of Practice was intended to provide a framework for member states in transposing the new VAT Directive and to provide a “definition of roles and responsibilities of the distinct actors within the e-invoicing process.”⁵¹ The Code of Practice was approved by CEN at the same time as it approved the Model Interoperability Agreement, on February 15, 2012.⁵²

Section 3.4 of the Code of Practice calls on service providers who are operating in the “four corner” model to adopt and use the Model Interoperability Agreement.⁵³ With the full transposition of the new VAT Directive and easier implementation of electronic invoicing in the European Union as a result, it can be expected that the Model Interoperability Agreement will play an ever increasingly important role in governing the transmission of electronic invoices and other business documents in the European Union and in countries trading with the European Union.

inafter Council Directive 2006/112/EC], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:347:0001:0118:en:PDF>.

46. Council Directive 2006/112/EC, *supra* note 45, art. 233, at 44.

47. FINAL REPORT OF THE EXPERT GROUP ON E-INVOCING, *supra* note 28, at 24–25.

48. *Explanatory Notes: VAT Invoicing Rules*, Eur. COMM’N DIRECTORATE GEN. TAXATION & CUSTOMS UNION (May 10, 2011), http://ec.europa.eu/taxation_customs/resources/documents/taxation/vat/traders/invoicing_rules/explanatory_notes_en.pdf (Comments).

49. *Id.*

50. *Reaping the Benefits of Electronic Invoicing in the European Union*, *supra* note 43, at 9 (Action 3.1).

51. *Id.*

52. See CODE OF PRACTICE, *supra* note 12, at 3.

53. *Id.* at 9.

