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### Contribution to ICC's input to the review of the E-Signature Directive

1. With an e-mail of 28 March 2003 Maria Farrell (ICC) asked for such an input as a sort of wishlist that might be used as a basis of ICC's comments.
2. The issue is discussed in ICC's paper "ICC comment on the use of advanced electronic signatures by legal persons for security purposes" of March 2003. It refers to the attached documents
  - *DIRECTIVE 1999/93/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 December 1999 on a Community framework for electronic signatures (E-Signature Directive)*
  - *Council Directive 2001/115/EC amending Directive 77/388/EEC with a view to simplifying, modernizing and harmonizing the conditions laid down for invoicing in respect of value added tax, Official Journal L 015, 17/01/2002 P. 0024-0028 (VAT-Directive).*
3. A review of the E-Signature Directive is indicated for the following reasons:
  - a. Implicitly, the scope of the E-Signature Directive is to assure the equivalence of an electronic signature with a handwritten signature. The crucial points are:
    - i. *Article 2 (Definitions) section 2* defines the "advanced electronic signature": *it is created using means that the signatory can maintain under his sole control;*
    - ii. *section 3* says: *signatory means a person who holds a signature-creation device and acts either on his own behalf or on behalf of the natural or legal person or entity he represents.*
  - b. This equivalence requires that any electronic document to be signed digitally has to be reviewed by a natural person before applying the private signing key for signature. Otherwise the legal effect of an electronic signature cannot be equivalent with a handwritten signature.
  - c. The consequence is that the "advanced electronic signature" based on the E-Signature Directive cannot be used in automatic processes which apply electronic signatures to documents, e.g. e-invoices.
4. This problem became obvious with the VAT Directive which states in *Article 2 (p. L 15/26)*:
  - a. Member States shall not require invoices to be signed (to render automatic invoicing possible)

- b. The contents of electronic invoices may be secured by applying “advanced electronic signatures according to the E-Signature Directive” (to secure the authenticity of the sender and the integrity of the content).  
Obviously, this implies that an automatically applied advanced electronic signature on an electronic document cannot be equivalent to a handwritten signature.
  5. In ICC’s paper “ICC comment on the use of advanced electronic signatures by legal persons for security purposes” of March 2003 the suggestion is that the member states should solve pragmatically the important problem of electronically signed e-invoices within their legislation, i.e. VAT regulations.
  6. However, securing e-invoices is just a special case of using public key certificates and electronic signatures (PKI technology) for other purposes than making electronic signatures equivalent to handwritten signatures. Indeed, most applications of the PKI technology deal with authentication of any entities (natural or legal persons, servers, etc.) or securing data. All these applications also need a reliable infrastructure as designed in the E-Signature Directive.
  7. Therefore, it is necessary to change the implicit scope of the E-Signature Directive which makes an advanced electronic signature exclusively equivalent to a handwritten signature.
  8. Our suggestions are as follows:
    - a. Basically the Definitions of *Article 2* should be changed such that the member states can make legal implementations which consist of
      - i. an infrastructure law which regulates the setup of providers (certification authorities, registration authorities), specifications for signature creation and verification devices, liability etc;
      - ii. and separate regulations of the legal effect of electronic signatures depending on the qualification of the signing entity.
    - b. This implies that a signatory for an advanced electronic signature does not have to be a natural person (see *Article 2*). It could also be a legal person.
    - c. It also implies that the term *under his sole control (Article 2, section 2c)* must be specified:
      - i. If the electronic signature is equivalent with a handwritten signature *under his sole control* means that only a specific natural person has access to the secure signature creation device and reviews the content of every document to be signed.
      - ii. If the electronic signature is for securing documents, e.g. signing of e-invoices, *under his sole control* means that a legal entity is responsible for the access to the secure signature creation device; the signing can be performed by an automatic process.
  9. Obviously, this is just a first step to make the E-Signature Directive apt for a clear separation between using PKI technology for signing in the sense of a handwritten signature and using PKI technology for authentication and securing documents.
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