



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 26.11.1999
COM(1999)626 final

1998/0191 (COD)

OPINION OF THE COMMISSION

**pursuant to Article 251(2) (c) of the EC Treaty,
on the amendments of the European Parliament
to the Common Position of the Council regarding the**

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on a Community Framework for electronic signatures

**AMENDING THE PROPOSAL OF THE COMMISSION
pursuant to Article 250(2) of the EC Treaty**

EXPLANATORY MEMORANDUM

Article 251 (2) c) requests the Commission to express its opinion on the amendments proposed by the European Parliament in its second reading.

The Commission hereby presents its opinion on these amendments to the Council's Common Position regarding the proposal for a European Parliament and Council Directive on a common framework for electronic signatures.

The amended proposal incorporates those amendments proposed by the European Parliament at Second Reading which were accepted by the Commission.

The amendments to the Commission proposal have been highlighted using *strikethrough* for deleted text and *bold* and *underlined* for new or amended text.

1. INTRODUCTION

1.1. a) Background

On 13 May 1998, the Commission adopted a proposal for a European Parliament and Council Directive on electronic signatures 'A Common Framework for Electronic Signatures' (COM (1998) 297 final)¹ and formally transmitted the proposal to the European Parliament and to the Council on 16 June 1998.

The Economic and Social Committee gave its Opinion on the 2/3 December 1998² and the Committee of the Regions on the 13/14 January 1999³.

The European Parliament adopted a favourable Resolution at its First Reading on the 13th January 1999, and proposed 32 amendments to the Commission proposal⁴.

On 29 April 1999 the Commission adopted an amended proposal⁵ in conformity with Article 250 (2) of the Treaty, incorporating 22 of the amendments in full, in part or in principle.

The Council, acting in accordance with Article 251 of the Treaty, formally adopted a common position on 28 June 1999⁶ on which the Commission delivered its opinion on 16 July 1999.⁷

In the second reading, the European Parliament on 27 October 1999 proposed 5 amendments to the Common Position⁸.

¹ OJ C 325, 23.10.1998, p. 5

² OJ C 40, 15.2.1999, p. 29

³ OJ C 93, 06.4.1999, p. 33

⁴ OJ C 104, 14.4.1999, p. 49

⁵ COM (1999)195 final of 29.4.1999

⁶ OJ C 243, 27.8.1999 p. 33

⁷ SEC(1999) 1154 final of 16.7.1999 (not yet published)

⁸ Doc. A5 - 0034/1999

1.2. b) Purpose of the Commission proposal

The purpose of the Directive is to facilitate the use of electronic signatures and to contribute to their legal recognition. It aims at establishing a legal framework for electronic signatures and for certain certification services in order to ensure the proper functioning of the internal market. The legal basis for the proposal is Art. 47 (2), 55 and 95 of the Treaty.

Based on a technology-neutral approach, the proposed Directive focuses on certificates supplied to the public and aimed at identifying the sender of electronic data. To encourage the development of certification services, it prevents Member States from submitting Certification Service Providers (CSP) to prior authorisation schemes. However, Member States are free to set up voluntary accreditation schemes. It also provides for the legal recognition of electronic signatures as equivalent to hand-written signatures and establishes liability rules for CSP. Finally, the proposed Directive foresees co-operation mechanisms with third countries to meet the requirements of global electronic communications.

2. OPINION OF THE COMMISSION ON THE AMENDMENTS OF THE EP

Of the 5 amendments adopted by the European Parliament at Second Reading, the Commission accepted all amendments in full.

The Commission accepted those amendments because they enhance the clarity and consistency of the text.

3. CONCLUSION

The Commission has accepted all amendments proposed by the European Parliament at Second Reading in whole.

In accordance with Article 250 (2) of the EC Treaty, the Commission amends its initial proposal, incorporating these amendments.

4. MODIFIED PROPOSAL

a) Principles

In response to the second reading by the European Parliament, a number of new provisions have been accepted. The majority of these serve either to remove ambiguities or to enhance the clarity and consistency of the text. In addition, there are some new ideas, which expand on the original text but do not change the fundamental principles.

b) Explanation of the main amendments

1. Modification of recital 16:

As suggested by European Parliament's amendment 1, the clarification that the Directive does not aim to regulate systems, which are governed by private law agreements has been added. The proposed modification aims to introduce the "principle of party autonomy" more explicitly by stating that, firstly, systems "governed by voluntary private law agreements between a defined number of participants" do not require a statutory regulatory framework and, secondly, that electronic signatures which are used within such systems should not be denied legal effectiveness and admissibility as evidence in legal proceedings.

The new wording does not mention explicitly the so-called "closed user groups". This is advantageous because the text of the Directive itself does not mention "closed systems" but refers to legal agreements between private persons. This helps avoiding legal uncertainty regarding the exact definition of closed user groups, which is unknown in civil law.

2. Modification of recital 23:

Amendment 3 of the European Parliament has been included, adding a new sentence to recital 23. It emphasises that multilateral agreements with third countries on mutual recognition of certification services could be beneficial in order to ensure interoperability at a global level. This is in line with the provisions laid down in Article 7 of the proposed Directive, which specifically addresses the global dimension. Article 7 (2) provides for the Commission to make proposals aimed at facilitating cross-border certification, in particular with respect to the implementation of standards and relevant international agreements.

Given the global nature of electronic commerce, it is important to work toward the mutual recognition of certificates in the global marketplace. The proposed new sentence is meant to stress the significance of this issue.

3. Modification of Article 6:

As suggested by European Parliament's amendments 4 and 5, two modifications concerning Article 6 have been added.

Firstly, a new phrase has been included in Article 6 (1) (a) in order to ensure that a certification-service-provider is not only liable for the accuracy of all information included in a qualified certificate but also for the completeness of all information required to be considered a qualified certificate.

This is of particular significance because for a consumer it is not only important that the information included in a certificate is correct but also that a certificate contains all information necessary to be classified as a qualified certificate. Therefore, this modification contributes to a clearer wording of Article 6 (1).

Secondly, amendment 5 of the European Parliament has been introduced by adding a new sentence to Article 6 (4). The additional sentence states that a certification-service-provider shall not be liable for damage arising from the use of a qualified certificate which exceeds the limit on the value of transactions for which the certificate can be used. Thus, the provision makes clear that a certification-service-provider is not liable for an excessive use of the certificate.

This amendment contributes to more consistency between Article 6 (3), where a similar provision already has been included, and Article 6 (4).

4. Clarification of the text:

As suggested by amendment 2 of the European Parliament, the wording in recital 21 has been changed. This recital refers to Article 5 (1). It is meant to emphasise that it is national law, which determines the fields in which Member States allow electronic documents and electronic signatures to be used. The recital was part of a compromise between the Commission and the Member States in order to mitigate the "strong" wording in Article 5 (1), stating that Member States shall ensure that advanced electronic signatures satisfy the legal requirements of a signature in the same manner as a hand-written signature.

The modified sentence expresses more explicit that national law governs the fields in which electronic documents and electronic signatures can be used.

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on a Community Framework for electronic signatures

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 47(2), 55 and 95 thereof,

Having regard to the proposal from the Commission ⁹,

Having regard to the Opinion of the Economic and Social Committee ¹⁰,

Having regard to the Opinion of the Committee of the Regions ¹¹,

Acting in accordance with the procedure laid down in Article 251 of the Treaty ¹²,

- (1) Whereas on 16 April 1997 the Commission presented to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions a Communication on an European Initiative in Electronic Commerce;
- (2) Whereas on 8 October 1997 the Commission presented to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions a Communication on ensuring security and trust in electronic communication - Towards a European framework for digital signatures and encryption;
- (3) Whereas on 1 December 1997 the Council invited the Commission to submit as soon as possible a proposal for a Directive of the European Parliament and of the Council on digital signatures;
- (4) Whereas electronic communication and commerce necessitate "electronic signatures" and related services allowing data authentication; whereas divergent rules with respect to legal recognition of electronic signatures and the accreditation of certification-service providers in the Member States may create a significant barrier to the use of electronic communications and electronic commerce; whereas, on the other

* This document is based on the German original version of the EP amendments
⁹ OJ C 325, 23.10.1998, p. 5.

¹⁰ OJ C 40, 15.2.1999, p. 29.

¹¹ Opinion delivered on 13 and 14 January 1999 (OJ C 93, 6.4.1999, p. 33).

¹² Opinion of the European Parliament of 13 January 1999 (OJ C 104, 14.4.1999, p. 49), Council Common Position of 28.6.99 (OJ C 243, of 27.8.1999 p. 33) (not yet published in the Official Journal) and Decision of the European Parliament of ... (OJ C ...) (not yet published in the Official Journal).

hand, a clear Community framework regarding the conditions applying to electronic signatures will strengthen confidence in, and general acceptance of, the new technologies; whereas legislation in the Member States should not hinder the free movement of goods and services in the internal market;

- (5) Whereas the interoperability of electronic-signature products should be promoted; whereas, in accordance with Article 14 of the Treaty, the internal market comprises an area without internal frontiers in which the free movement of goods is ensured; whereas essential requirements specific to electronic-signature products must be met in order to ensure free movement within the internal market and to build trust in electronic signatures, without prejudice to Council Regulation (EC) No 3381/94 of 19 December 1994 setting up a Community regime for the control of exports of dual-use goods¹³ and Council Decision 94/942/CFSP of 19 December 1994 on the joint action adopted by the Council on the basis of Article J.3 of the Treaty on European Union concerning the control of exports of dual-use goods¹⁴;
- (6) Whereas this Directive does not harmonise the provision of services with respect to the confidentiality of information where they are covered by national provisions concerned with public policy or public security;
- (7) Whereas the internal market ensures the free movement of persons, as a result of which citizens and residents of the European Union increasingly need to deal with authorities in Member States other than the one in which they reside; whereas the availability of electronic communication could be of great service in this respect;
- (8) Whereas rapid technological development and the global character of the Internet necessitate an approach which is open to various technologies and services capable of authenticating data electronically;
- (9) Whereas electronic signatures will be used in a large variety of circumstances and applications, resulting in a wide range of new services and products related to or using electronic signatures; whereas the definition of such products and services should not be limited to the issuance and management of certificates, but should also encompass any other service and product using, or ancillary to, electronic signatures, such as registration services, time-stamping services, directory services, computing services or consultancy services related to electronic signatures;
- (10) Whereas the internal market enables certification-service-providers to develop their cross-border activities with a view to increasing their competitiveness, and thus to offer consumers and businesses new opportunities to exchange information and trade electronically in a secure way, regardless of frontiers; whereas in order to stimulate the Community-wide provision of certification services over open networks, certification-service-providers should be free to provide their services without prior authorisation; whereas prior authorisation means not only any permission whereby the certification-service-provider concerned has to obtain a decision by national authorities before being allowed to provide its certification services, but also any other measures having the same effect.

¹³ OJ L 367, 31.12.1994, p. 1. Regulation as amended by Regulation (EEC) No 837/95 (OJ L 90, 21.4.1995, p. 1).

¹⁴ OJ L 367, 31.12.1994, p. 8. Decision as last amended by Decision 99/193/CFSP (OJ L 73, 19.3.1999, p. 1).

- (11) Whereas voluntary accreditation schemes aiming at an enhanced level of service-provision may offer certification-service-providers the appropriate framework for developing further their services towards the levels of trust, security and quality demanded by the evolving market; whereas such schemes should encourage the development of best practice among certification-service-providers; whereas certification-service-providers should be left free to adhere to and benefit from such accreditation schemes;
- (12) Whereas certification services can be offered either by a public entity or a legal or natural person, when it is established in accordance with the national law; whereas Member States should not prohibit certification-service-providers from operating outside voluntary accreditation schemes; whereas it should be ensured that such accreditation schemes do not reduce competition for certification services;
- (13) Whereas Member States may decide how they ensure the supervision of compliance with the provisions laid down in this Directive; whereas this Directive does not preclude the establishment of private-sector-based supervision systems; whereas this Directive does not oblige certification-service-providers to apply to be supervised under any applicable accreditation scheme;
- (14) Whereas it is important to strike a balance between consumer and business needs;
- (15) Whereas Annex III covers requirements for secure signature-creation devices to ensure the functionality of advanced electronic signatures; whereas it does not cover the entire system environment in which such devices operate; whereas the functioning of the internal market requires the Commission and the Member States to act swiftly to enable the bodies charged with the conformity assessment of secure signature devices with Annex III to be designated; whereas in order to meet market needs conformity assessment must be timely and efficient;
- (16) Whereas this Directive contributes to the use and legal recognition of electronic signatures within the Community; whereas a **statutory** regulatory framework is not needed for electronic signatures exclusively used within ~~closed~~ systems, **which are based on voluntary agreements under private law between a defined number of participants**; ~~nevertheless electronic signatures which fulfil the requirements laid down in this Directive and which are used within closed user groups should be legally recognised~~; whereas the freedom of parties to agree among themselves the terms and conditions under which they accept electronically signed data should be respected to the extent allowed by national law; **the legal effectiveness of electronic signatures used in such systems and their admissibility as evidence in legal proceedings must be recognised**;
- (17) Whereas this Directive does not seek to harmonise national rules concerning contract law, particularly the formation and performance of contracts, or other formalities of a non-contractual nature concerning signatures; whereas for this reason the provisions concerning the legal effect of electronic signatures should be without prejudice to requirements regarding form laid down in national law with regard to the conclusion of contracts or the rules determining where a contract is concluded;
- (18) Whereas the storage and copying of signature-creation data could cause a threat to the legal validity of electronic signatures;

- (19) Whereas electronic signatures will be used in the public sector within national and Community administrations and in communications between such administrations and with citizens and economic operators, for example in the public procurement, taxation, social security, health and justice systems;
- (20) Whereas harmonised criteria relating to the legal effects of electronic signatures will preserve a coherent legal framework across the Community; whereas national law lays down different requirements for the legal validity of hand-written signatures; whereas certificates can be used to confirm the identity of a person signing electronically; whereas advanced electronic signatures based on qualified certificates aim at a higher level of security; whereas advanced electronic signatures which are based on a qualified certificate and which are created by a secure-signature-creation device can be regarded as legally equivalent to hand-written signatures only if the requirements for hand-written signatures are fulfilled;
- (21) Whereas in order to contribute to the general acceptance of electronic authentication methods it has to be ensured that electronic signatures can be used as evidence in legal proceedings in all Member States; whereas the legal recognition of electronic signatures should be based upon objective criteria and not be linked to authorisation of the certification-service-provider involved; whereas national law governs the **fields in which use of** electronic documents and electronic signatures **can be used**; whereas this Directive is without prejudice to the power of a national court to make a ruling regarding conformity with the requirements of this Directive and does not affect national rules regarding the unfettered judicial consideration of evidence;
- (22) Whereas certification-service-providers providing certification-services to the public are subject to national rules regarding liability;
- (23) Whereas the development of international electronic commerce requires cross-border arrangements involving third countries; **whereas in order to ensure interoperability at a global level, agreements on multilateral rules with third countries on mutual recognition of certification services could be beneficial;**
- (24) Whereas in order to increase user confidence in electronic communication and electronic commerce, certification-service-providers must observe data protection legislation and individual privacy;
- (25) Whereas provisions on the use of pseudonyms in certificates should not prevent Member States from requiring identification of persons pursuant to Community or national law;
- (26) Whereas, for the purposes of the application of this Directive, the Commission should be assisted by a management committee; whereas, since the measures necessary for the implementation of this Directive are management measures within the meaning of Article 2 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission¹⁵, they should be adopted by use of the management procedure provided for in Article 4 of that Decision.

¹⁵ OJ L 184, 17.7.1999, p. 23.

- (27) Whereas two years after its implementation the Commission will carry out a review of this Directive so as, inter alia, to ensure that the advance of technology or changes in the legal environment have not created barriers to achieving the aims stated in this Directive; whereas it should examine the implications of associated technical areas and submit a report to the European Parliament and the Council on this subject;
- (28) Whereas, in accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty, the objective of creating a harmonised legal framework for the provision of electronic signatures and related services cannot be sufficiently achieved by the Member States and can therefore be better achieved by the Community; whereas this Directive does not go beyond what is necessary to achieve that objective,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Scope

The purpose of this Directive is to facilitate the use of electronic signatures and to contribute to their legal recognition. It establishes a legal framework for electronic signatures and certain certification-services in order to ensure the proper functioning of the internal market.

It does not cover aspects related to the conclusion and validity of contracts or other legal obligations where there are requirements as regards form prescribed by national or Community law nor does it affect rules and limits, contained in national or Community law, governing the use of documents.

Article 2

Definitions

For the purpose of this Directive:

- (1) "electronic signature" means data in electronic form which are attached to or logically associated with other electronic data and which serve as a method of authentication;
- (2) "advanced electronic signature" means an electronic signature, which meets the following requirements:
- (a) it is uniquely linked to the signatory;
 - (b) it is capable of identifying the signatory;
 - (c) it is created using means that the signatory can maintain under his sole control; and
 - (d) it is linked to the data to which it relates in such a manner that any subsequent change of the data is detectable;

- (3) "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;
- (4) "signature-creation data" means unique data, such as codes or private cryptographic keys, which are used by the signatory to create an electronic signature;
- (5) "signature-creation device" means configured software or hardware used to implement the signature-creation data;
- (6) "secure-signature-creation device" means a signature-creation device which meets the requirements laid down in Annex III;
- (7) "signature-verification-data" means data, such as codes or public cryptographic keys, which are used for the purpose of verifying an electronic signature;
- (8) "signature-verification device" means configured software or hardware used to implement the signature-verification-data;
- (9) "certificate" means an electronic attestation, which links signature-verification data to a person and confirms the identity of that person;
- (10) "qualified certificate" means a certificate which meets the requirements laid down in Annex I and is provided by a certification-service-provider who fulfils the requirements laid down in Annex II;
- (11) "certification-service-provider" means an entity or a legal or natural person who issues certificates or provides other services related to electronic signatures;
- (12) "electronic-signature-product" means hardware or software, or relevant components thereof, which are intended to be used by a certification-service-provider for the provision of electronic-signature services or are intended to be used for the creation or verification of electronic signatures;
- (13) "voluntary accreditation" means any permission, setting out rights and obligations specific to the provision of certification services, to be granted upon request by the certification-service-provider concerned, by the public or private body charged with the elaboration of, and supervision of compliance with, such rights and obligations, where the certification-service-provider is not entitled to exercise the rights stemming from the permission until it has received the decision by the body.

Article 3

Market access

1. Member States shall not make the provision of certification services subject to prior authorisation.
2. Without prejudice to the provisions of paragraph 1, Member States may introduce or maintain voluntary accreditation schemes aiming at enhanced levels of certification-service provision. All conditions related to such schemes must be objective, transparent, proportionate and non-discriminatory. Member States may not limit the number of accredited certification-service-providers for reasons, which fall within the scope of this Directive.

3. Each Member State shall ensure the establishment of an appropriate system that allows for supervision of certification-service-providers which are established on its territory and issue qualified certificates to the public.

4. The conformity of secure signature-creation-devices with the requirements laid down in Annex III shall be determined by appropriate public or private bodies designated by Member States. The Commission shall, pursuant to the procedure laid down in Article 9, establish criteria for Member States to determine whether a body should be designated.

A determination of conformity with the requirements laid down in Annex III made by the bodies referred to in the first subparagraph shall be recognised by all Member States.

5. The Commission may, in accordance with the procedure laid down in Article 9, establish and publish reference numbers of generally recognised standards for electronic-signature products in the Official Journal of the European Communities. Member States shall presume that there is compliance with the requirements laid down in Annex II, point (f), and Annex III when an electronic signature product meets those standards.

6. Member States and the Commission shall work together to promote the development and use of signature-verification devices in the light of the recommendations for secure signature-verification laid down in Annex IV and in the interests of the consumer.

7. Member States may make the use of electronic signatures in the public sector subject to possible additional requirements. Such requirements shall be objective, transparent, proportionate and non-discriminatory and shall relate only to the specific characteristics of the application concerned. Such requirements may not constitute an obstacle to cross-border services for citizens.

Article 4

Internal market principles

1. Each Member State shall apply the national provisions which it adopts pursuant to this Directive to certification-service-providers established on its territory and to the services which they provide. Member States may not restrict the provision of certification-services originating in another Member State in the fields covered by this Directive.

2. Member States shall ensure that electronic-signature products which comply with this Directive are permitted to circulate freely in the internal market.

Article 5

Legal effects of electronic signatures

1. Member States shall ensure that advanced electronic signatures which are based on a qualified certificate and which are created by a secure-signature-creation device:

- (a) satisfy the legal requirements of a signature in relation to data in electronic form in the same manner as a handwritten signature satisfies those requirements in relation to paper-based data; and

(b) are admissible as evidence in legal proceedings.

2. Member States shall ensure that an electronic signature is not denied legal effectiveness and admissibility as evidence in legal proceedings solely on the grounds that it is:

- in electronic form, or
- not based upon a qualified certificate, or
- not based upon a qualified certificate issued by an accredited certification-service-provider, or
- not created by a secure signature-creation device.

Article 6

Liability

1. As a minimum, Member States shall ensure that by issuing a certificate as a qualified certificate to the public or by guaranteeing such a certificate to the public a certification-service-provider is liable for damage caused to any entity or legal or natural person who reasonably relies on that certificate:

- (a) as regards the accuracy at the time of issuance of all information contained in the qualified certificate **and as regards the fact that the certificate contains all the information required to be considered a qualified certificate;**
- (b) for assurance that at the time of the issuance of the certificate, the signatory identified in the qualified certificate held the signature-creation data corresponding to the signature-verification data given or identified in the certificate;
- (c) for assurance that the signature-creation data and the signature-verification data can be used in a complementary manner in cases where the certification-service-provider generates them both;

unless the certification-service-provider proves that he has not acted negligently.

2. As a minimum Member States shall ensure that a certification-service-provider who has issued a certificate as a qualified certificate to the public is liable for damage caused to any entity or legal or natural person who reasonably relies on the certificate for failure to register revocation of the certificate unless the certification-service-provider proves that he has not acted negligently.

3. Member States shall ensure that a certification-service-provider may indicate in a qualified certificate limitations on the use of that certificate, provided that the limitations are recognisable to third parties. The certification-service-provider shall not be liable for damage arising from use of a qualified certificate which exceeds the limitations placed on it.

4. Member States shall ensure that a certification-service-provider may indicate in the qualified certificate a limit on the value of transactions for which the certificate can be used, provided that the limit is recognisable to third parties. **The certification-service-provider**