

# NewsLetter

No. 52 September 2004

## New Swiss Law on Electronic Signatures

**As of 1 January 2005, the Swiss Law on Electronic Signatures (*Bundesgesetz über die Zertifizierungsdienste im Bereich der elektronischen Signatur*) will become effective. The objective of this new law is to regulate the recognition of Certification-Service-Providers and to regulate their activities. The law also introduces the rules governing the validity of contracts executed by qualified electronic signatures and sets out the requirements for such qualified electronic signatures. Further, it regulates the liability for misuse of such signatures.**

### Recognition of Certification-Service-Providers

The new law will replace the current governmental decree on services of electronic certification (*Verordnung über Dienste der elektronischen Zertifizierung*). Contrary to initial expectations, the decree did not spark widespread use of certified electronic signatures and the establishment of a public key infrastructure ("PKI") in Switzerland. The new law will be accompanied by a new governmental



by Dr. André Thalmann  
+41 1 265 75 64  
athalmann@wwp.ch

decree, a draft of which is currently in circulation. It should be noted that the final version of the decree may differ from the draft discussed herein.

Certification-Service-Providers ("CSPs") will be able, on a voluntary basis, to obtain recognition from a

recognition organisation. The recognition organisation itself will have to be accredited by an accreditation organisation, which will be a federal governmental agency, such as the Swiss Accreditation Service ("SAS") or the Federal Office of Communication ("OFCOM"). Accordingly, the new law envisages a PKI with three organisational levels. However, as long as there are no recognition organisations, the CSPs will be recognized by the accreditation organisation.

The requirements for the recognition of CSPs relate to their organisation, their technical abilities and their financial situation. In particular, the CSPs will have to

procure insurance coverage for their liability. A foreign CSPs recognised by a foreign organisation can be recognised in Switzerland if (a) it has been recognised under a foreign law, (b) such law has equivalent provisions regarding such recognition, (c) the qualification of the foreign recognition organisation are equivalent to what would be required of a Swiss recognition organisation and (d) the foreign organisation warrants to collaborate with the Swiss recognition organisation for the surveillance of the CSP. This recognition of foreign CSPs is welcomed in view of the current inexistence of Swiss CSPs. A list of recognised CSPs will be published by the accreditation organisation.

### Issue of Certificates by Certification-Service-Providers

The new law defines an *advanced electronic signature* (*fortgeschrittene elektronische Signatur*) as an electronic signature which is (a) uniquely linked to the holder, (b) capable of identifying the signatory, (c) created using means that the signatory can maintain under his sole control and (d) linked to the data to which it relates in such a manner that any subsequent change of the data is detectable.

A *qualified electronic signature* (*qualifizierte elektronische Signatur*) is defined as an advanced electronic signature which has been generated on a secure signature-creation device and is based on a qualified certificate valid at the time of generation.

*Qualified certificates* (*qualifizierte Zertifikate*) can only be issued by recognised CSPs. Qualified certificates are electronic attestations which link signature-verification data to a person and confirm the identity of that person. A qualified certificate can only be issued for signature-creation data and signature-verification data which satisfy the legal requirements (to be set out in the separate decree). The law sets out broadly the requirements for the relevant signature-creation devices and for the signature-verification procedure, while the technical details will be regulated by the OFCOM.

A qualified certificate may only be issued after the CSP has personally verified the identity of the holder. The decree will provide some exceptions to this requirement, especially for renewal of certificates. While a qualified certificate can only be issued to an individual, such certificate can attest that the holder is an authorised signatory of a company. In such cases, the CSP will require evidence of the agreement of such company with such signatory. The CSP must also verify that the holder of the certificate is the owner of the relevant signature-creation data. The CSP will have further duties, such as to draw the holder's attention to the possibilities of misuse of his or her electronic signature. The CSP must ensure that the current validity of all qualified certificates it has issued can be verified at all times.

Recognised CSPs will be required to provide electronic time stamps to confirm that specific electronic data was in existence at a given time.

A CSP will be liable to the holder of the signature-creation data and third parties who rely on a valid qualified certificate for damages caused by the CSP's breach of its legal duties. The burden of proof of compliance with the legal duties will be on the CSP.

#### **Uses for qualified electronic signatures**

The Swiss Law on Electronic Signatures will modify the Swiss Code of Obligations ("CO") by introducing a subsection in Article 14 CO according to which a qualified electronic signature based on a qualified certificate issued by a recognised CSP will be equivalent to the handwritten signature, subject to contrary legal or contractual provisions.

Accordingly, contracts which under Swiss law are only valid if they are made in writing will also be valid if signed with a qualified electronic signature. For example, under Swiss law an assignment of a claim requires a written document bearing the signature of the assignor. For such widely used legal transactions, the option to use electronic signatures promises to be extremely beneficial.

The holder of signature-creation data will be liable to third parties for damages caused by such third parties' reliance on a valid qualified certificate, except where the holder can prove that he or she has taken the necessary and reasonable security precautions, to be detailed in the governmental decree, to prevent the misuse of the signature-creation data. In view of this

potential liability, a qualified certificate for signature-verification data should not be procured before it is actually needed.

The Swiss Federal Department of Finance has issued a decree allowing companies to exchange data relevant for VAT purposes, such as invoices, by electronic means, provided that the electronic data bears an electronic signature. As long as there are no recognized CSPs, it is sufficient that the electronic signature is certified by a provider who would qualify for recognition under the current governmental decree. However, after 12 months following the availability of qualified certificates, only electronic signatures based on such qualified certificates will satisfy the requirements for the electronic exchange of VAT relevant data. This is an area where the use of qualified electronic signatures might become widespread, especially if data exchange solutions integrating such signatures are proposed in the marketplace.

The Swiss Law on Electronic Signatures will also amend certain other laws, especially allowing several governmental registers to be maintained in electronic format and communication between the relevant registrars and citizens to take place in an electronic format. Thus, e-government is likely to be another area where the qualified electronic signature will be used intensely.

#### **NewsLetter**

The **ww&p NewsLetter** provides comments on new developments and significant issues of Swiss law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this **NewsLetter** should seek specific advice on the matters which concern them.

© Walder Wyss & Partners, Zurich, 2004

#### **ww&p Walder Wyss & Partners Attorneys at Law**

Münstergasse 2  
P.O. Box 2990  
CH-8022 Zurich  
Phone +41 1 265 75 11  
Fax +41 1 265 75 50  
reception@wwp.ch  
www.wwp.ch

London Representative Office  
9 Gray's Inn Square  
London WC1R 5JQ  
Phone +44 20 7405 2043  
Fax +44 20 7405 0605