

Forum of European Supervisory Authorities for Electronic Signatures (FESA)

Working Paper on “Established on its territory“ (Art. 4.1)

March 7th, 2003

Art. 4.1 of the Electronic Signature Directive 1999/93/EC states: “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.”

In the FESA meetings of October 14th, 2002 and March 7th, 2003 the interpretation of this clause was discussed and the attending members of FESA agreed, that they generally interpret this clause as described in the following text. Note: This paper shall just document a common understanding of interpretation of Art. 4.1 of the directive. It does not take into account any details of possible individual cases and of course it cannot bind the decision of a FESA member anyhow.

1. Establishment is determined as usual.

Natural persons have a residence, legal entities have a seat. If certificates are issued by one (natural or legal) person and this person puts its name into the issuer field of the certificates, it should be no problem to determine, in which country this person is established. This country applies its national provisions on the certification-service-provider.

2. Generally we assume, that the certification-service-provider mentioned in the issuer field of the certificate has overall responsibility. The country where this certification-service-provider is established has responsibility for supervision.

Example: A certification-service-provider has its seat in country A. The trust-centre is hosted by a company in country B. The CSP lends personal from a company in country C. The trust centre equipment is the property of a company in country D (e. g. sale and lease back). Registration is done by companies seated in countries E, F and G. Certificates are issued to customers in all those countries and also in country H. All those companies are bound by a network of several treaties.

In such a case we must look, who has overall responsibility. Who is liable for the certificates in the end? Who determines the certification-practice-statement? As the directive requires (Annex I b), that the qualified certificate contains “the identification of the certification-service-provider and the State in which it is established” we can look at the issuer field in the certificate. This is the field where the issuer informs the public, who is responsible for the certificate. In cases of doubt this field can help us to determine, which company is responsible. The country where this company is located is responsible for supervision. (And the supervisory authority in this country will have to take a look at all those treaties: Can the company really fulfil all the requirements of Annex II of the directive? Or can it not take responsibility because it is too dependent from all the other companies?)

Therefore we will generally assume that the issuer mentioned in the issuer field of the certificate has overall responsibility for the certification-service and has to be supervised by the country where he has its seat (typically the country code of this country will also be mentioned in the issuer field).

It could be the case, that the issuer named in the certificate is not responsible at all for the certificates. This could e. g. be a fraud case, where somebody issues certificates under the name of a well-known certification-service-provider in order to trick persons to set their trust into the wrong certificates. Also in such a case the supervisory authority of the country named in the issuer field of the certificate will have to act first. If this supervisory authority finds out, that the issuer named in the certificate has nothing to do with the certificates, but the certificates are in fact issued by a person in another country, it will inform the supervisory authority of this other country.