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tScheme Limited's response
to the Department of Trade and Industry's
Consultation document EC 1999/93/EC
- Community Framework for Electronic Signatures

18th June 2001

After consultation and consideration with its Members, tScheme is pleased to offer the following response to the Department of Trade and Industry's Consultation on EC Directive 1999/93/EC.

Throughout our discussions a number of issues repeatedly appeared. tScheme's conclusion is that they have a bearing on all of the questions posed in the consultation. In brief they are:

- The market potential for Trust Services and electronic signatures is generally extremely large. However we believe the market will develop steadily making rapid legislative action both unnecessary and unwise.
- A balance must be struck between the rigorous implementation of the Directive and promoting business. The two can be compatible, but an overzealous implementation of the Directive could harm the market.
- A balance must be found between allowing the industry to develop and providing appropriate self-regulation to foster trust in e-commerce, without stifling the potential.
- tScheme has every confidence in its Approval Profiles, yet we are concerned by the more authoritarian and non-voluntary approach taken by some member states. The UK must ensure that all member states meet their obligations for mutual recognition.
- The Directive must be implemented, in the UK and other member states, in a manner as to ensure that the underlying principle – the proper functioning of the internal market – must be made a reality. Trade barriers should be removed, not put in place.
- Mutual recognition of Qualified signatures is in the interests of UK businesses, provided that other Member states follow the requirements accurately. tScheme has no doubt that its profiles will comply with those in preparation by EESSI, as they are being prepared with this specifically in mind.

1. Do you agree that the implementation of a supervisory regime should be based on a de minimis approach and subject to review in two years' time?

- **tScheme agrees that the supervisory regime, whatever form it takes, should be based on a de minimis approach on the part of the government.**
- **tScheme would accept an extension of its current role for the purpose of implementing such a supervisory regime, subject to a discussion on funding, liability and continued independence.**

Continuing co-operation between tScheme and the Government in establishing a self-regulatory body has so far proved extremely effective. The work is ongoing and tScheme has no doubt that the scheme's maturity will see a fully fledged body capable of providing a level of regulation to suit both industry and government. tScheme has also worked hard to ensure that it satisfies the objective, transparent, proportionate and non-discriminatory criteria set out by the EC Directive.

tScheme welcomes the proposals for a supervisory regime which essentially continues current regulatory practices. Subject to appropriate funding arrangements, tScheme would also welcome a role in the supervisory system for UK provision of Trust Services, in such a way that permitted tScheme to retain its independence as an industry-led, self-regulatory organisation. tScheme could therefore not take on any powers relating to sanctions on Trust Service Providers who have not sought or attained full tScheme Approval.

tScheme agrees with the DTI's cautious approach with regard to the uptake of electronic Trust Services. The potential for growth clearly exists, and tScheme does see its scheme, and its approved Trust Service Providers, having a leading role in the development of such services. Currently we do not know which services will achieve mass-market acceptance and which technical solutions will become popular. Therefore we concur with a review period of two years.

tScheme feels a more general review, specifically including a review on a European level of the Directive, would also be prudent. With the speed of progress in the industry, and taking into consideration that much of the Directive was drafted up to three years ago, computing power has perhaps doubled, internet usage has more than tripled and businesses are already well established with e Commerce infrastructures. With the new information available, and the previous points in mind, elements of the Directive might benefit from an overhaul.

tScheme also has concerns over European-wide recognition of the UK scheme. Some member states are proposing government run, mandatory schemes. tScheme believes not only that these do not offer the consumer and the market greater security than schemes similar to tScheme, but also that they are in danger of breaching Article 3.1 of

the Directive. The compatibility of these various schemes is an area that might in the future cause concern. Whatever regulatory schemes emerge, there must be Europe-wide clarity of requirements for electronic Trust Service Providers and Users.

2. Do you believe that the UK should have a designated body and if so, who should it be and how should they assess compliance with Annex III of the Directive?

- **tScheme believes that there is sufficient demand to warrant further investigation on the establishment or appointment of a standards conformance evaluation body, to assess SSCDs against Annex III.**

tScheme approval and assessment is not currently expected to extend to assessment of the products used for the creation of signatures. However, where this constitutes a core element of the service offering, the initial generation of key pairs will be covered by the Profiles; additionally all tScheme Profiles are written to take into account any relevant European standards.

However, if the Directive is not immediately effective in creating a single market, tScheme recognises that future UK suppliers of SSCDs might be put at a competitive disadvantage through not having such a designated body. Member states must recognise each other's conformance schemes; and the UK must not be left behind by remaining out of step with the prevailing system across all Member States.

Regarding a designated body, if deemed necessary: whilst the tScheme approach could be seen as capable of extension to cover the whole of the SSCD market, the resources required are uncertain but likely to be prohibitive. tScheme would need to examine closely the business and financial aspects of any proposal to extend its activity to assessing SSCD's before making any future commitment to participate. Even based on the current approach of tScheme in using existing accredited assessment bodies, there would be a large cost from which the industry does not currently expect to derive much benefit.

3. What do you believe will be the impact of Article 3.5 and is there any further action the Government could take?

- **Article 3.5 should ensure that the whole of Europe works towards common standards. This is essential to the removal of barriers to trade, and also to the compatibility and comparability of technology and related services.**

4. Do you agree with our analysis of the meaning of Article 3.7 and the proposed course of action to ensure compliance with it?

- **tScheme welcomes the Government’s proactive approach in the use of electronic signatures through the Government Gateway for UK citizens. tScheme agrees that additional requirements for certain types of transaction may need to be introduced.**

One of the most positive functions of the Directive is the prevention of barriers to trade, and Article 3.7 will continue to drive progress in this area.

5. Do you agree with the proposed regulation to implement Article 5.1 (a)

- **tScheme does not believe that the proposed regulation would satisfy the requirements of the Directive, since it would not deal with the requirement that the advanced electronic signature should have the same effect in relation to the data in electronic form as a hand written signature would in relation to paper based data. In effect, the directive requires that an advanced electronic signature should satisfy requirements for writing.**

tScheme feels this issue is one on which the Government should seek additional legal advice, and perhaps further industry consultation.

6. Do you have any comments on the proposal to implement Article 6 and that this should be achieved by regulations on certification service providers?

- **tScheme believes that the issue of implementation of Article 6 is more a matter for UK Trust Service Providers. However, tScheme does wish to see the industry move forward without barriers being put in its path. tScheme’s concern is that the terms of Art 6.1 and 6.2, which relate to strict liability and the reverse burden of proof regarding negligence in the provision of TSP services, could prove such a barrier to growth.**

tScheme recognises that the value of a certificate is clearly dependent on the level of liability which attaches to it. However, existing UK common law already provides a strong basis for liability where appropriate. Where a greater level of value is required to be underwritten in the provision of a Trust service, this can be made the subject of specific contract terms between the provider and the relying parties.

7. Do you agree with the proposal to implement Article 8.2 and thereby place specific data protection requirements on certification service providers?

- **Whilst predominantly a matter for certification service providers, this Article causes some concern for tScheme as it stands, due to its potential for inhibition of market development. tScheme therefore recommends a review of this at the European level.**
- **Concerns regarding Data Protection are entirely legitimate. However, existing Data Protection legislation already provides safeguards in this area.**

The plans to implement this Article as it stands could have a seriously disabling impact on the development of companies offering services, and hence affect the development of the Market. Article 8.2 should be implemented purposively, so as to maintain its underlying aims, without the unintended side effects.

This can be done to some extent by making it clear in the implementing legislation that when collecting data for the purpose of issuing a certificate to a member of the public, a certification service provider may collect data with the consent of the data subject; and that data collected specifically for the purpose of issuing a certificate can only be used for purposes other than issuing and maintaining it with the express consent of the data subject. However, data may be collected in relation to the revocation of the certificate without the express consent of the data subject.

It also needs to be clear that a certification service provider may collect data from the same data subject for other purposes, for example for the legitimate interests of its usual business, even during the same interaction, and even duplicating the data collected for the issue of the certificate, for example to enable recovery of identity and key information. Such data collection remains subject to the normal data protection regime.

8. Do you have any views on the likely impact of the Directive in the UK and how it may assist in promoting trusted and secure electronic transactions?

- **tScheme believes the underlying message of the Directive is the harmonization of electronic signatures, and services based on these within member states. Given this, tScheme is somewhat dismayed that the Directive is being interpreted differently by other member states, and is therefore more likely to throw up barriers and highlight differences.**

- **tScheme approval must achieve pan-European acceptance if UK service providers are to compete on a level playing field.**
- **The market is not clearly defined, and coupled with the pace of technology, tScheme feels that restrictive or inflexible legislation could well harm the market in ways that cannot be currently predicted.**

tScheme believes that the Department of Trade and Industry has listened sufficiently to UK industry on this matter. Through existing legislation and the frameworks already in place, tScheme feels the Directive, in spirit at least, has been largely implemented already in the UK.

The Electronic Communications Act, and tScheme's role, encouraged by Government, does go a long way toward complying with the Directive. In particular, the intention to notify the status of tScheme as a voluntary accreditation scheme under Article 3.2 is welcomed by tScheme.

However, the Directive itself does raise a number of concerns, and tScheme is aware that many within the industry feel that there is a chance it could damage e-commerce, rather than facilitate it as intended.

In the preceding text, tScheme has raised concerns over elements of the Directive and the potential they have for harming the progression of e-commerce. These mainly centre around potential complications - specifically that surrounding data protection, which we regard as a barrier to trade if taken beyond a level strictly necessary to protect the public. Overall a minimal approach to the implementation of the Directive would be strongly backed by tScheme. The opportunity for review in two years also seems wholly prudent, particularly if this were linked to the review of the Directive itself, due by July 2003.

In summary, tScheme sees its role, and those of its Approved service providers, as being pivotal in the development of secure e-commerce. Whilst the take up and potential market is unclear, DTI's interpretation and views on implementation would seem, after taking into account our earlier comments, to constitute a good interpretation of the Directive which will assist the industry in developing the market opportunities.

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