

## Pestalozzi Update November 2016

### The Regulated Electronic Seal

#### What Companies Need to Know When Using the Regulated Electronic Seal in the Future

On 1 January 2017, the fully revised version of the Swiss Federal Law on Certification Services in the Domain of the Electronic Signature, short the CSES, is expected to enter into force. With the revised CSES, the so called regulated electronic seal will be introduced. The regulated electronic seal is essentially a certified and government-approved electronic signature for companies that can be used to sign electronic letters and messages but also to sign contracts. However, since the regulated electronic seal will not be deemed equivalent to a handwritten signature, caution should be exercised when using the regulated electronic seal to sign contracts.

##### 1. Background

On 1 January 2005, the Swiss Federal Law on Certification Services in the Domain of the Electronic Signature, short the CSES, entered into force. With this legislative act, the digitalization of the handwritten signature was initiated. Together with the CSES, paragraph 2<sup>bis</sup> of Article 14 of the Swiss Code of Obligations ("CO") was added as the actual core piece of this innovation with regard to contractual law. This paragraph states that a so called qualified electronic signature, if based on a so called qualified certificate issued by a certified provider of certification services within the meaning of the CSES, ("QES") is deemed equivalent to a handwritten signature.

Reflecting the fact that – de facto – only a natural person is able to apply a handwritten signature, the QES

- The fully revised version of the CSES, introducing the regulated electronic seal, is expected to enter into force on 1 January 2017.
- The regulated electronic seal has been designed for companies, while the regulated electronic signature has been designed for natural persons.
- The regulated electronic seal is a certified and government-approved electronic signature for companies. It allows the user to establish whether certain information actually originated from the alleged sender (authenticity) and whether the content of such information has been distorted/modified after it has been "sealed" (integrity).
- The regulated electronic seal can also be used for signing contracts.
- Contracts, for which the written form is prescribed by law, are formally invalid if signed with a regulated electronic seal.
- Where the parties have agreed that a contract must be in writing (without further specifying such requirement), any amendments or modifications thereto are formally invalid if signed with a regulated electronic seal.

**also is exclusively reserved for natural persons.** In accordance with the principle that companies are represented by their governing bodies, which ultimately are natural persons, it has in particular been rejected to make the QES also available to companies.

However, companies may nevertheless be obligated by a QES. This simply requires an **authorized representative** of the company, e.g. a member of the board of directors of a limited company having sole signing authority, to sign on behalf of the company by **using his or her personal QES**. Thus, it is merely impermissible to issue a QES to a company.

In everyday working life, especially with regard to bulk businesses, it has become evident that it is impracticable and does not improve efficiency if an authorized representative of a company has to sign on behalf of the entity by using his or her personal (non-transferable) QES. If one imagines, for example, that a member of the executive board of a major industrial company would have to apply his or her personal QES – instead of his handwritten signature – on all procurement contracts to which the company is a party, this is not surprising.

Swiss contract law includes the principle of the freedom of form. Accordingly, under Swiss law the large number of contracts may be concluded orally or even implicitly. Thus, a handwritten signature and therefore also **the QES is often not required**. Furthermore, in electronic commerce (particularly in emails) electronic signatures are often merely used to create **trust in the identity of the sender** and in the **integrity of the message's content**.

This is why in practice – certain industry sectors exempted – so called advanced electronic signatures, which are **not based on certified and government-approved certificates**, are often used instead of a QES. Such advanced electronic signatures may be issued to companies and allow verification of (i) whether the electronic information indeed originates from such company and (ii) whether the electronic information has subsequently been modified. However, they are not based on a government-defined quality of certificate which would improve the level of trust put into the described verification process.

This shortcoming shall be rectified in the course of the total revision of the CSES by the introduction of the regulated electronic seal, which will be based on a so called (government-defined) regulated certificate.

## 2. Overview: Total Revision of the CSES

On 7 July 2016, the referendum period against the fully revised version of the CSES expired unused. The revised law will therefore enter into force on a date to be determined by the Swiss Federal Council (most likely on 1 January 2017). The main changes that have been incorporated into the revised CSES ("*newCSES*") are the following:

- The **regulated certificate** will be introduced. In future, the regulated electronic seal as well as the regulated electronic signature will be based on this certificate. Further, the regulated certificate will in future be available as a basis for additional applications.
- The **regulated electronic seal for companies and authorities** and the **regulated electronic signature for natural persons** will be available next to the QES.
- The **QES** will only be deemed equivalent to a handwritten signature if it is linked to a **qualified time stamp** (Art. 14 para. 2<sup>bis</sup> *newCO*).

## 3. The Concept of the Regulated Electronic Seal

The term "regulated electronic seal" is defined in Art. 2 lit. d *newCSES*. According to this provision, the regulated electronic seal essentially is an advanced electronic signature, which was created in accordance with the requirements of the CSES and which is (and must be) based on a "regulated certificate". The term "regulated certificate" is defined in Art. 2 lit. g *newCSES* as an electronic certificate meeting certain requirements of the CSES and which was **issued** by a **certified provider** of certification services within the meaning of the CSES.

Accordingly, companies that intend to use the regulated electronic seal necessarily need to approach one of the certified providers of certification services if they want to purchase a regulated electronic seal, or much rather the underlying regulated certificate on which the seal is based. Since only four such providers exist or rather have been certified<sup>1</sup> so far, the choice is currently lim-

<sup>1</sup> The directory of the certified providers of certification services as defined by the CSES can be found under the following web link: <https://www.sas.admin.ch/sas/de/home/akkreditiertestellen/akkreditierungssuchen/pki.html> (last visited on 1 November 2016).

ited. Furthermore, all of the certified providers of certification services are companies domiciled in Switzerland. Therefore, also **foreign companies must obtain at least the regulated certificate** from one of the **Swiss-based providers** if they wish to use such a regulated electronic seal.

For both the regulated electronic seal and the regulated certificate it is the certified provider's statutory **liability** that functions as the **basis of trust**. A specific basis of trust is necessary because the recipient of a "sealed" document or a "sealed" message usually is not in a direct contractual relationship with sender or with the provider of the used regulated certificate. Therefore, in order to increase the recipient's trust in the regulated electronic seal, the certificate holder (Art. 59a CO and Art. 59a newCO) as well as the certified provider of the used regulated certificate (Art. 16 CSES and Art. 17 newCSES) are liable for a certain care and diligence when carrying out their duties imposed by the CSES. This corresponds to the provisions on the qualified certificate under the current CSES.

The explanatory materials pertaining to the fully revised version of the CSES, however, leave many questions on the technical aspects of the regulated electronic seal unanswered. At least article 9 para. 1 lit. b newCSES states that a regulated certificate may only be issued to the name of a company if a natural person authorized to represent the company appears in person and provides evidence for his or her own identity as well as for his or her power of representation. More urgent issues, like the question of **how the access to the regulated electronic certificate** within a company **shall be controlled**, are **not addressed**. In this respect, the Swiss Federal Council's corresponding implementation provisions and the developments in practice will have to be analysed once they become available.

#### 4. Applications of the Regulated Electronic Seal in Contract Law

First of all, it is important to note that the **regulated electronic seal will not be deemed equivalent to a handwritten signature**. Under the newCSES, the QES will remain the only legal equivalent to the handwritten signature.

As a consequence, contracts, for which the **written form is prescribed by law** (e.g. the assignment according to Art. 165 para. 1 CO), are **formally invalid** if signed with a **regulated electronic seal**.

Furthermore, contracts, for which the written form is not prescribed by law, but for which the parties have **stipulated the written form**, are **formally invalid** if signed with a **regulated electronic seal**. This applies if the parties merely stipulated the written form without further specifying such requirement. The reason for this lies in Art. 16 para. 2 CO which stipulates, with regard to such a case, that the statutory provisions governing the written form as required by law also apply to the contractually agreed written form. Accordingly, (in addition to the handwritten form itself) only a QES is sufficient to sign such contract in a valid form.

Thus, at a first glance, the future applications of the regulated electronic seal in the area of contract law seem to be quite limited. However, if one recalls the fact that the **written form is only prescribed** by Swiss contract law **in very few cases**, this statement must be relativized. Further, **existing contracts**, for which the parties have stipulated the written form, **may be amended** by mutual agreement so as to allow the use of a regulated electronic seal for future amendments and modifications. Finally, the parties of a future contract who wish to stipulate the written form may explicitly state in the relevant clause that the regulated electronic seal shall also be deemed acceptable to meet the written form requirement.

The above considerations show that in contract law the regulated electronic seal may well be put to use with the right implementation efforts. However, it is questionable whether the individual companies will be willing to invest in such efforts. This will likely depend on the overall benefits which the companies expect from the use of a regulated electronic seal (inside and outside of the area of contract law).

#### 5. Further Potential Applications for the Regulated Electronic Seal

In today's digitalized world, messages of immense significance, which were previously sent by means of a signed letter, are often simply sent by **e-mail**. On a regular basis, however, the relevant information is **not or not adequately** secured, which is why a corresponding **potential for misuse** exists in this area. Precisely in this respect the regulated electronic seal may provide for a remedy. In particular, if the information or rather the e-mails are "sealed", doubts of the recipient as to the identity of the sender (authenticity) and the genuineness of the message (integrity) might be dispelled.

Potential further applications for the regulated electronic seal (in addition to emails) also exist with regard to all other electronic letters, notifications and communications issued by a company. To date, companies that wanted to prove the authenticity and integrity of their electronic messages were (theoretically) required to equip each message with a QES issued for a single natural person. Especially with regard to bulk businesses this approach is impracticable. As a way out, many companies are using digital solutions, which are – if at all – based on certificates issued by providers **that are not certified in Switzerland** (e.g. DocuSign, Comprova, GlobalSign). The disadvantage here is, in particular, that neither the certificate holder nor the issuer of the certificate are subject to the specific liability provisions of the CSES and the CO (Art. 59a Co and Art. 59a *new*CO as well as Art. 16 CSES and Art. 17 *new*CSES). These trust-building liability provisions only apply if (at least) a regulated certificate (in the sense of the *new*CSES) is being used.

In the future such messages can be signed with a regulated electronic seal. Since the regulated electronic seal is based on a regulated certificate issued by a certified provider of certification services, i.e. on a **certificate of government-defined quality**, the recipients of such messages **may rely on the fact** that the message actually originates from the company that appears on the seal (authenticity) and that the content of such message has not been modified after it has had been sealed (integrity).

## 6. Conclusion

The **most important benefit** of the regulated electronic seal is that it provides a (simple) way for companies to create or even **increase confidence in authenticity and integrity of their electronic messages**.

In fact, the regulated electronic seal is nothing more than a **certified and government-approved electronic signature for companies** that can be used to verify whether the information actually originates from the alleged sender and whether the information has been modified retroactively.

Of course, these services can also be rendered by electronic signatures that have not been audited and approved by a government supervised body. The **decisive factor, however, is the level of confidence** that the recipients have in the statements (regarding authenticity and integrity) generated by a specific electronic signature. Accordingly, the statement that a certain document actually originates from the alleged author and that its content has not been modified, is **likely more trustworthy** if it was generated by a certified and government-approved electronic signature; this is especially due to the mentioned liability provisions.

Therefore, the regulated electronic seal is primarily suited for companies that regularly dispatch numerous emails or electronic letters, messages, notifications, etc. and at the same time place particular emphasis on the possibility of a secure, simple and unambiguous **verification of the authenticity and the integrity** of the respective content. Further, the regulated electronic seal is also suitable for companies whose communication is regularly **aimed at creating a legally binding effect**. If, for example, a company is entitled to purchase certain goods upon sending a simple notification (e.g. call-purchase of commodities), it may very well make sense to secure the authenticity and the integrity of such notifications (with a view to possible costs-consequences) to the maximal extent.

Finally, apart from contracts for which the written form is prescribed by law or was stipulated by the parties, the regulated electronic seal may **also be used to sign contracts**. This may lead to a **considerable simplification of administrative procedures**, particularly for companies that sign a large number of contracts on a daily basis. In this regard, however, it is important to **examine existing contracts and contract templates in detail** and to possibly have the implementation of the regulated electronic seal into existing processes accompanied by specialists.

*Contributors: Dr. Christian Leuenberger (Partner), Dr. Thomas Legler (Partner), Florian Schnyder (Associate) und Adam Weibel (Associate)*

For further information please visit our website or contact us:



Dr. Christian Leuenberger  
Partner (Zurich)  
christian.leuenberger@pestalozzilaw.com  
+41 44 217 92 13



Dr. Thomas Legler  
Partner (Geneva)  
thomas.legler@pestalozzilaw.com  
+41 22 999 96 21

**Pestalozzi Attorneys at Law Ltd.**

**Zurich** - Loewenstrasse 1 | 8001 Zurich | Switzerland | Call +41 44 217 91 11

**Geneva** - Cours de Rive 13 | 1204 Geneva | Switzerland | Call +41 22 999 96 00

[www.pestalozzilaw.com](http://www.pestalozzilaw.com)