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CCBE position paper on the e-ID proposal

1/04/2022

The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 45 countries, and through them more than 1 million European lawyers.

EXECUTIVE SUMMARY

- The CCBE welcomes the e-ID proposal, reviewing the e-IDAS regulation, as it will contribute to stronger, healthier, more secure and more widely used digital ecosystem of the EU. However, some amendments are necessary.
- The CCBE would like to point out the danger in enabling issuers of the European Digital Identity Wallet (EDIW) to collect information not necessary for the wallet service and combine the EDIW with personal data from other services, in case of express request of the user. The CCBE suggests deleting the option for express request in amended Article 6a.7 in order for such data processing activities to be functionally separated from the provision of the wallet service.
- The CCBE considers that the scope of the notion of "relying parties", according article 6b, includes lawyers. In this respect, sufficient measures must be taken to ensure that EDIW will be usable for small businesses and technical means should be made available for small-sized relying parties without having to make considerable investment in technical infrastructure.
- Lawyers and the CCBE should be involved in the development of self-regulatory codes of conduct for the use of EDIW.
- The CCBE considers that there must be clarification between:
    - On one hand, the provisions concerning the scope of the regulation excluding aspects related to the conclusion and validity of contracts or other legal obligations where there are requirements as regards form laid down by national or Union law (Recital 19 and Article 2), and
    - On the other hand, the provisions covering the requirements for the recognition of qualified electronic attestations of attributes which apply without prejudice to Union or national law defining additional sector specific requirements as regards form with underlying legal effects (Recital 27 and Article 45).
- Bars and Law Societies must be able to act as authentic sources to verify attributes such as professional qualifications and titles.
- The CCBE considers that the proposal should clearly define what its intentions are in relation to currently existing, operating electronic ledgers.

1. Introduction

European lawyers have always been flagship professional users of electronic transactions working outside the technical sector: they play a key role as the facilitator of the use electronic services towards many members of the society who need to access court and administrative services. Therefore, the CCBE itself has always been an important partner in supporting initiatives in a cross-border framework for secure, trustworthy and easy-to-use electronic transactions**. The CCBE has already adopted a number of position papers in relation to EU frameworks of electronic identification, authentication and signatures,[1] and conducted research in the different possible methods regarding the electronic identification possibilities of lawyers.[2]**

On 3 June 2021, the European Commission presented a proposal for a regulation amending Regulation (EU) 910/2014 as regards establishing a framework for a European Digital Identity[3] ("the e-ID proposal")[4] and a report on the evaluation of the regulation (EU) 910/2014 on electronic identification and trust services for electronic transactions in the internal market, the so-called eIDAS regulation (the "Report")[5].

The main findings of the evaluation of the Regulation (EU) 910/2014 on electronic identification and trust services for electronic transactions in the internal market ("eIDAS") were that since its adoption, eIDAS has not achieved its potential with respect to electronic identity, and that it falls short of addressing some new market demands due to its limitations to the public sector, and the complexity for online private providers to connect to the system. In relations to trust services, the Commission's aim is to enhance full harmonisation and acceptance of trust services in cross-border context.

Both objectives are in line with the position of the CCBE which considers that the e-ID proposal will contribute to stronger, healthier, more secure and more widely used digital ecosystem of the European Union. However, with regard to certain proposals, we believe that some adjustments are need to be made that we would like highlight in this position paper, and regarding some other proposals, further clarifications are needed to achieve the desired effect.

2. Issuers of EDIW and their power to combine personal data with other sources

With regard to amended Article 6a.7, the CCBE would like to point out the danger in enabling issuers of the European Digital Identity Wallet (EDIW) to collect information not necessary for the wallet service and combine the EDIW with personal data from other services. Although most of the provision is about prohibiting such activity, the final part of the sentence enables such use if the user has expressly requested it.

The CCBE believe that allowing such data processing in an unconstrained way, solely referring to "express request" is not in line with our recent experience of how easily the largest service providers can acquire such express consent to their advantage. We have to be mindful how important EDIWs will become, and the central role they will play in the everyday life of electronic transactions, as a kind of new bottleneck. History of both data protection and consumer protection regulation has shown that merely acquiring the consent of a user is not enough to protect the user's interests.

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1 With regard to 2011 and 2012, see CCBE Position on electronic identification, authentication and signatures and CCBE Position on the proposed electronic identity and trust services regulation (COM(2012) 238/2), for an earlier paper, see Guidelines for e-signature projects and for using electronic signatures by legal professionals.

2 See CCBE Recommendations on Electronic ID cards for the legal profession and Framework for establishing a European Electronic ID-cards system from 2007, and a technical report made for the CCBE at Technological choices of CCBE in the electronic identification of EU lawyers.

3 COM(2021) 281 final

4 See https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2021:0281:FIN

5 See https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2021:290:FIN

The CCBE suggests deleting the option for express request in amended Article 6a.7 in order for such data processing activities will have to be functionally separated from the provision of the wallet service. Otherwise, the CCBE considers that the proposal should, at least, contain an option for regulatory intervention by the European Commission or independent bodies in restricting the power of the EDIW issuers to process personal data even if the user so requests.

3. Lawyers as Relying Parties

The e-ID proposal provides that relying parties will also be subject to eIDAS, although to a lesser degree than trust service providers (amended Article 6b, 12b). This includes an obligation to (a) notify their intention to rely on the EDIW to member states if such parties are "*established to provide specific services*" (Article 6b.1), to (b) use a common mechanism for the authentication of identification data and the use of attested attributes accessing in the EDIW, and to (c) use the EDIW where strong user authentication is required by contractual obligation or law.

The CCBE considers that, according to such provisions, the scope of the notion of "relying parties" seems to go well beyond utility companies, banks and other typically large organisations subject to detailed regulation. It may also include micro and small organisations, including lawyers, especially in the scope of anti-money laundering, combatting terrorist financing and counter-proliferation financing, and also know-your-customer requirements. According to the latest Eurostat business data from 2019,[6] 95.319% of all enterprises in NACE 69.1 (legal activities) has less than 10 employees and 73.417% has no or just one employee.

That means that, as a cornerstone of the new amendment, the EDIW would only work in practice if "relying parties" are not treated solely as public utilities or large companies, **and sufficient measures are taken to ensure that EDIW will be usable for such small businesses** as well, even with strong authentication. Also, the CCBE considers that the European Commission should take into account that simply standardisation measures will not be sufficient, and that at the time of entry into force of the new amended regulation**, technical means should already be available for such small-sized relying parties without having to make considerable investment in technical infrastructure**.

The CCBE notes that, based on the amended Article 12b.4 of the e-ID proposal, there will be "self-regulatory codes of conduct" for the use of EDIW which shall ensure acceptance of electronic identification in particular by service providers relying on third party identification services. **In this respect, the CCBE would like to stress that, given that lawyers might be required to use EDIW, the involvement of the CCBE should be ensured in the development of these codes of conduct.**

4. Cross-border recognition of qualified electronic attestations

Art. 2(3) and Recital 19 provide that the Regulation does not affect any national or Union laws that require a certain legal form for the conclusion or validity of a contract or other obligations. In other words, the Regulation leaves it to the Member States to decide on how certain legal transactions have to be concluded. This is for good reason, requirements as to the legal form have the purpose of protecting the parties to a legal transaction and making them aware of underlying economic and legal risks. These requirements also have evidentiary and advisory functions. That is why in many Member States, e.g., property purchase agreements have to be notarised. This reservation regarding the legal form in Art. 2 (3) is uncontroversial and has not been called into question by the Commission.

The new eID proposal now includes the qualified electronic attestation of attributes in Recital 27 and Art. 45a et seq. Such attributes may include a driver's licence, a diploma or a medical licence. The electronic attestation of such attributes may be stored in the Wallet**.**

[6] Table SBS_SC_1B_SE_R2

The proposal sets out requirements so that the electronic attestations can be recognised in other Member States as being equivalent to paper form attestations, article 45a.2 stating that these attestations "*shall have the same legal effect as lawfully issued attestations in paper form"*. This will be a crucial improvement for the freedom of movement within the EU and the everyday life of many citizens.

According to the last sentence of Recital 27, the Member States may still define additional sector-specific formal requirements for the cross-border recognition of qualified electronic attestations of attributes. For example, when a medical doctor from one Member State applies for a medical licence to practice as a doctor in another Member State, that Member State may still require a paper form application and/or paper form proof of certain facts such as the medical accreditation.

According to the Commission, this right of the Member States to lay out additional formal requirements for the cross-border recognition of electronically attested attributes in the last sentence of Recital 27 is meant to be reflected in the proposed amendments to Art. 2 (3) eIDAS shown above.

Yet, Art. 2(3) and Recital 19 on the one hand and Recital 27 on the other hand deal with fundamentally different concepts: *Civil laws on the legal form of contracts and other obligations* have nothing to do with formal requirements a Member State may lay out in *an administrative procedure in a certain sector* for the recognition of certain attributes. It is essential not to mix the two concepts – and there is no reason to.

The CCBE considers that the amendments to the eIDAS lead to an unclear, hardly comprehensible wording of Art. 2(3), even more since Recital 19 (previously 21) remains unchanged. There has been no intent in the legislative process to change Art. 2(3) in the first place. However, merely because of the amendments, Art. 2(3) could potentially be construed in a narrower way subsequently by courts. Therefore, the CCBE considers that the proposal should avoid this unnecessary legal uncertainty by retaining the original form of Art. 2(3) and moving the amendments Art. 45c on the requirements for the qualified electronic attestation of attributes.

In this regard, the CCBE proposes that Article 2(3) should be amended as following*:*

> *3. This Regulation does not affect national or Union law related to the conclusion and validity of contracts or other legal or procedural obligations relating to* ~~***sector specific requirements as regards***~~ ***form*** ~~***with underlying legal effects***~~.

In addition, the CCBE proposes to insert a new paragraph 3 in Article 45c, drafted as follows:

> *"2. Qualified electronic attestations of attributes shall not be subject to any mandatory requirement in addition to the requirements laid down in Annex V.*
>
> ***3. These requirements for qualified electronic attestation of attributes shall apply without prejudice to Union or national law defining additional sector specific requirements as regards form with underlying legal effects"***.

5. The term "public sector" and the role of self-regulatory bodies including bars and law societies

The new definition of "authentic source"[7] refers to both public sector bodies and private entities as a possible primary source of information to be used in attestations.

However, both Article 45 and Annex VI draws a significant difference between public sector bodies and private entities as authentic sources. Qualified providers of attestations are required only to verify the authenticity of attributes when relying on authentic sources that are within the public sector.

It is uncertain and may differ from a Member State to another, whether Bars and Law Societies (or other self-regulatory bodies) are considered as part of the public sector or not. At the same time, Annex VI mentions that "*Professional qualifications, titles and licences*" would form part of the minimum list attributes that qualified providers of electronic attestations of attributes are required to be able to verify.

Considering the current operation of electronic court services and other electronic administrative proceedings, the CCBE strongly believes that the universal capability to verify whether a person is entitled to act as a lawyer in any proceeding is of utmost importance for both consumers, courts and public authorities. Several projects of the European Union already rely on verifying such attributes (e.g. the e-CODEX and the Find-A-Lawyer projects ensuring for several Member States that the submitting party is a lawyer). Therefore, this capability should be preserved.

Only Bars and Law societies can provide timely and authentic information on whether a person is entitled to act as a lawyer. **It is therefore important that Bars and Law Societies can directly act as authentic sources for such attributes, without any mandatory use of intermediaries**. Moreover, it should be possible to maintain well-working national technical solutions in this regard. **Therefore, the role of Bars and Law Societies in providing information on these attributes should be clarified among these lines, as well as the possibility to maintain established national technical solutions.**

6. Electronic ledger uniqueness

Finally, regarding Article 45h.2 on the uniqueness of electronic ledger, the CCBE considers that while regulation of certain aspects of electronic ledger are imperative and pressing, it is not convinced that Article 45h, as it currently stands, contributes in any way to legal certainty, or that the regulatory concept of trust services could in any way contribute to the clarification of existing problems.

In principle, the raison d'être of electronic ledgers is to provide a special, technical support to the everyday meaning of trust and, in that way, enable decentralisation of certain services. When, the EU institutions adopt a legal act such as the e-ID proposal, they do not rely on such technical support, and any institution or measures they entrust based on their legal power will be trusted because of such legal acts only.

The definition of electronic ledger is very wide, and thus, it is important to restrict to what the e-ID proposal is trying to address. Electronic ledgers can be both permissioned and permissionless, and any regulator can designate (permissioned) "*special electronic ledgers*" with special power entrusted on them by the EU institutions. The e-ID proposal tries to do this for unclear reasons in Article 45h-45i, and gives a presumption of "*uniqueness and authenticity of data*" such special ledgers will contain. These ledgers may be created only by qualified trust service providers specifically entitled to do so (special nodes of the special ledger).

[7] 'Authentic source' is a repository or system, held under the responsibility of a public sector body or private entity, which contains attributes about a natural or legal person and is considered to be the primary source of that information or recognised as authentic in national law.

The recitals of the e-ID proposal make only a generic reference to "*use cases that build on electronic ledgers*". We have to emphasise that we consider the European blockchain initiatives (such as the European Blockchain Service Infrastructure, EBSI) to be very important building blocks for building trust and future eGovernment services, but this does not mean that the right regulatory approach is to define electronic ledgers in general in the eIDAS, and to require that only qualified trust service providers can participate in such blockchains as nodes.

In this regard, the CCBE considers that the eIDAS trust services approach is not an appropriate approach, and creates unnecessary tension between currently existing, market based, bottom-up, global electronic ledger solutions and the foreseen pan-EU-sectoral approach. The volatile market of global electronic ledgers may see such a regulatory approach as another attempt to isolate certain parts of a technically global infrastructure by way of regulation.

If there is indeed a clear need for such a regulation, it should be adopted at the sectoral level for a specific purpose or use case, explaining why only "special nodes" can operate that particular ledger and decentralised application, or why that particular regulation is necessary (such as for issuing crypto-assets to the public). However, none of the documents underlying the e-ID proposal and the Report explains in any way that such a generic regulation of electronic ledgers nodes is necessary.[8]

Inclusion of some basic regulatory elements in the eIDAS with regard to electronic ledgers will not cause people to trust or adopt such tools. The trust in permissionless ledgers (such as decentralised apps built on Ethereum etc.) is not based on regulatory mechanisms, and should remain out-of-scope of the eIDAS. Similarly, many permissioned electronic ledgers operate now based on the current trustworthiness of the current operators (such as ledger products offered by large IT providers).

The CCBE considers that the eIDAS proposal should clearly define what its intentions are in relation to currently existing, operating electronic ledgers. Even just providing a simple definition for electronic ledgers and a minimalistic legal effect as set out in Article 45h might have considerable negative effect on existing solutions, similar to what the Electronic Signature Directive of 1999/93/EC had when it was adopted. None of the evaluation studies or other preparatory documents of the Commission indicated in any way that courts in the EU had so far any problem in evaluating legal effects the electronic ledgers. This is nothing like the problem we had in the late 1990s with electronic signatures, so we believe a different regulatory approach is warranted to support and widen the use of electronic ledgers, if that's necessary.

Such a regulatory first approach, without knowing exactly the intended effects (delegating everything to the Commission implementing acts and ETSI/CEN), will only benefit the few already existing trusted service providers being represented in the standardisation bodies.

The unsustainability of the current approach is clearly shown by the presumptions defined in Article 45h and 45i. It says a "qualified electronic ledger shall enjoy the presumption of the *uniqueness and authenticity of the data it contains*".

Will this presumption about "uniqueness and authenticity" apply in general of those particular bits of data recorded on the ledger? Clearly not. **The current provision and presumption should be clearly referring to uniqueness and authenticity of the data *within that given ledger only***. If a qualified trust provider of electronic ledgers maintains two different electronic ledgers, the presumption of uniqueness (and authenticity etc.) of a record will only apply within the same ledger, but not apply to its other ledger.

What is then the purpose of defining the "*proper technical way of operation*" of ledgers in the eIDAS, and future standards built on this, if this legal effect is empty, because "uniqueness and authenticity" in a specific electronic ledger has no legal meaning?

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[8] See Annex II Commission Staff Working Document Accompanying the document Report, SWD/2021/130 final: only 28% of respondents supported regulation of electronic evidence on electronic ledgers, which is a different use case from that of the Proposal.

The current wording will just increase confusion about what legal effects (if any) specific future ledgers will have, and why this regulation was necessary. As we can see with the NFT bubble started in 2021, people will try to attach a more sensible, but false meaning regarding the uniqueness of data referred to in the ledger: people mistakenly associate the NFT (as a unique reference within one given blockchain) with a digital picture or other data the NFT is referring to, and start to think about the NFT as some kind of licence or right in the data being referenced. That false belief is dangerous in itself, and such false interpretations lead to misleading interpretation of the regulatory intentions of the eIDAS.