



CCBE POSITION ON THE PROPOSED ELECTRONIC IDENTITY AND TRUST SERVICES REGULATION (COM(2012) 238/2)

Conseil des barreaux européens – Council of Bars and Law Societies of Europe

association internationale sans but lucratif

Avenue de la Joyeuse Entrée 1-5 – B 1040 Brussels – Belgium – Tel.+32 (0)2 234 65 10 – Fax.+32 (0)2 234 65 11/12 – E-mail ccbe@ccbe.eu – www.ccbe.eu

CCBE Position on the proposed electronic identity and trust services regulation (COM(2012) 238/2)

The Council of Bars and Law Societies of Europe (CCBE) is the representative organisation of around 1 million European lawyers through its member bars and law societies from 31 full member countries, and 11 further associate and observer countries.

The CCBE seeks to assist the development of a safe and practical electronic environment for legal professionals throughout Europe, and for that reason has issued a number of recommendations and guidelines for its members.¹ In its response to the public consultation launched by the European Commission on electronic identification, authentication and signatures in May 2011, the CCBE expressed its support for the European Commission's proposal to review the existing Electronic Signature Directive, taking into account the positive impact this may have on the development of effective e-Justice systems and hence also on the improvement of access to justice in Europe. Digital signatures and other forms of electronic identification and authentication are often used to a greater or lesser extent in a number of Member States to enable lawyers to perform a wide range of operations, such as filing documents with the courts and public administrations or conducting cross-border proceedings and transactions. Other applications may also be developed through these technologies, for example, in the fields of legal aid or transactions related to fees and VAT.

The CCBE, therefore, welcomes the publication of the proposed Regulation on electronic identification and trust services for electronic transactions in the internal market² (hereinafter: "Regulation") and generally agrees with the objectives stated therein. However, the CCBE considers that some provisions in the current proposal need to be revised and, therefore, wishes to make certain recommendations, including a number of concrete amendments.

1. Concerns - Overview

We note that Article 20, paragraph 2 accords to a qualified electronic signature the equivalent legal effect of a handwritten signature. The logical consequence of such a provision is that the effect of a qualified electronic signature would vary amongst member states depending upon the legal effect of handwritten signatures according to the law of the member state in question. We consider this to be a proportionate and appropriate provision as it respects the principle of subsidiarity and does not seek to alter the substantive law of the member states either to seek to change the effect of handwritten signatures or to innovate by introducing a new category of electronic signature having a different effect from handwritten signatures within the domestic legal order.

However, we note also that, first, Section 4 introduces a new concept of electronic seal, and provides in article 28, paragraph 2, that an electronic seal is accorded the "legal presumption of ensuring the origin and integrity of the data to which it is linked" and, second, Article 34, paragraph 2, accords a similar legal presumption to an a document bearing a qualified electronic signature or a qualified electronic seal. We have substantial reservations about the adoption of such an approach, which creates in member states a severance of the legal effect of qualified electronic signatures and seals from the legal effects of handwritten signatures and of seals physically applied to documents. This is capable of leading to qualified electronic signatures and seals being accorded a higher status than the domestic legal order accords to handwritten signatures and physical seals. It may also produce other anomalies in individual member states. For example, in some states the adhibition of a physical seal is insufficient for certain purposes unless accompanied by a handwritten signature, for example of a director or other officer of the company whose seal is being adhibited. The effect of Article 28 paragraph 2 and article 34 paragraph 2, would result, in those member states, in an electronic

¹ Inter alia, the [CCBE Guidelines for e-signature projects and for using electronic signatures by legal professionals](#), February 2007, and the [CCBE Recommendations on Electronic ID cards for the legal profession](#), February 2007.

² [Proposal for a Regulation of the European Parliament and of the Council on electronic identification and trust services for electronic transactions in the internal market](#) (COM(2012) 238/2).

document with a qualified electronic seal (without also a qualified electronic signature) being effective whereas, under the domestic law a paper document with a physical seal, but without a handwritten signature where one was also required, being ineffective.

We are concerned that such innovations would be unwarranted interferences with the substantive law of member states and would infringe the principle of subsidiarity.

It is against the background of that overarching concern that the CCBE makes the following recommendations:

2. Electronic Seals: Section 4 of Chapter III (Articles 28 to 31)

Section 4 (Articles 28 to 31) introduces the new concept of electronic seals as a trust service, intended to ensure EU-wide acceptance of electronic versions of physical seals of legal persons (without necessarily any reliance on a signature of a natural person, in line with preamble 42).

Based on the impact assessment of the Regulation,³ the reasons for including a provision on electronic seals were stated to be the following:

(a) in comparison with electronic signatures, electronic seals "have a legally different significance, since *they can be performed without the direct consent of a physical person and consequently allowing for automated stamping*", (b) electronic seals can be considered "*as the electronic equivalent of stamps or seals on paper documents, which are tied to a legal entity rather than to a natural person*", and (c) "*a company could issue millions of authentic invoices matching EU legal requirements; without electronic seals, a responsible person of the company should sign each invoice separately to reach the same level of legal certainty*".

Although we are aware of the problems associated with the differences in how national jurisdictions deal with seals and their legal effects, both under areas of private and public law, we do not think that the appropriate approach to handle this is (a) to narrow down the applicability of electronic signatures to natural persons only (in contrast with the current definition of Article 2 paragraph 3 of 1999/93/EC Directive) and (b) to duplicate most of the electronic signature provisions under the electronic seal provisions as seen in Chapter III.

We think that the current approach of artificially separating electronic signatures based on whether the creators are natural or legal persons, causes more problems than it solves, and that all the national problems that we have been able to identify related to electronic seals could be solved more effectively at national level. Under Directive 1999/93/EC, it was possible for Member States to understand that a signatory could be either a natural or a legal person. If the Regulation is adopted based on the current approach, fundamental issues of representation and liability under national law will be affected (how can a legal person act, under what liability?) and in a negative way: their meaning will be inadvertently changed. We cannot identify in the impact assessment, or in the explanatory memorandum any legal requirement that would justify such a distinction (as is now proposed to be introduced) between natural persons who can, and legal persons who cannot exhibit an electronic signature. So we see a risk that the only apparently compelling reason behind this concept is to include a technical term already used in the market practice into legislation. Following such an approach of regulating for the sole reason of incorporating IT terms into the European legal order causes problems in the legal system, both in the integration of the Regulation into national laws and in the long term application thereof.

If there is a problem at the national level of creating millions of authentic invoices by private bodies or millions of e.g. electronic tax certificates by public bodies without signing the invoice or certificate separately (entering PIN codes etc.) by a natural person, this has to be solved at the national level, for example, by removing the regulatory requirement of SSCD (as neither use case requires qualified signatures based on EU law.)

Therefore, the recommendation of the CCBE is that the concept of electronic seals should not be introduced in the Regulation at all, that section 4 be deleted, and the necessary consequential

³ [Commission Staff Working Paper Impact Assessment Accompanying the Proposal for a Regulation of the European Parliament and of the Council on electronic identification and trust services for electronic transactions in the internal market \(COM\(2012\) 238 final\) \(SWD\(2012\) 136 final\).](#)

amendments be made to the remainder of the draft Regulation. In particular, the Regulation should define "signatory" in such a way as not to preclude member states, if they so desire, from empowering legal persons to sign specified documents without publicly disclosing the natural person who signed on behalf of such legal persons (as long as that is in accordance with national law). For this effect, the current definition of Article 2 paragraph 3 of 1999/93/EC Directive should be sufficient.

In the event that, contrary to this recommendation, it is decided to proceed with the introduction of electronic seals, it is, in the view of the CCBE, essential that the wording of the Regulation be amended so as to address the concerns expressed above with regard to subsidiarity. As already noted article 28 (2) deeply interferes in national laws by imposing a new legal effect that may not exist under national legal systems. We see no reason to introduce such difference between electronic seals and electronic signatures, and therefore, the legal effects of qualified electronic seals should be based on the existing legal effects of non-electronic seals (we might call them "physical seals" or "paper-based seals") that each jurisdiction might have. Furthermore, such an approach would be consistent with Article 20 which provides that a "qualified electronic signature shall have the equivalent legal effect of a handwritten signature", whatever that legal effect may be of a handwritten signature in a given Member State. Thus, if the concept of electronic seals cannot be left out of the Regulation, we suggest that paragraphs 2 and 3 of Article 28 to be amended as follows:

<i>Text proposed by the Commission</i>	<i>Amendments proposed by the CCBE</i>
<p><i>Article 28</i></p> <p>1. An electronic seal shall not be denied legal effect and admissibility as evidence in legal proceedings solely on the grounds that it is in electronic form.</p> <p>2. A qualified electronic seal shall enjoy the legal presumption of ensuring the origin and integrity of the data to which it is linked.</p> <p>3. A qualified electronic seal shall be recognised and accepted in all Member States.</p> <p>[...]</p>	<p><i>Article 28</i></p> <p>1. An electronic seal shall not be denied legal effect and admissibility as evidence in legal proceedings solely on the grounds that it is in electronic form.</p> <p>2. A qualified electronic seal shall enjoy the legal presumption of ensuring the origin and integrity of the data to which it is linked have the equivalent effect of a physically impressed seal as such effect might be prescribed under the national laws of each member state.</p> <p>3. A qualified electronic seal shall be recognised and accepted in all Member States Paragraph 3-7 of Article 20 and Articles 21-27 shall apply mutatis mutandis to electronic seals.</p> <p>[...]</p>

Correspondingly, the definition of “electronic seal” under Article 3 paragraph (20) should be deleted.

<i>Text proposed by the Commission</i>	<i>Amendments proposed by the CCBE</i>
<p><i>Article 3</i></p> <p>[...]</p> <p>(20) ‘electronic seal’ means data in electronic form which are attached to or logically associated with other electronic data to ensure the origin and the integrity of the associated data</p>	<p><i>Article 3</i></p> <p>[...]</p> <p>delete</p>

Preamble 47 should also be deleted. The reason is that the difference between the legal effects of an electronic signature and an electronic seal should not go further than the recommended wording of Article 28(2).

<i>Text proposed by the Commission</i>	<i>Amendments proposed by the CCBE</i>
<p><i>Preamble – recital 47</i></p> <p>In addition to authenticating the document issued by the legal person, electronic seals can be used to authenticate any digital asset of the legal person, e.g. software code, servers.</p>	<p><i>Preamble – recital 47</i></p> <p>delete</p>

3. Electronic Documents (Article 34)

Article 34 is related to the legal effects and the conditions of acceptance of electronic documents where paragraph 1 provides for an equivalence of electronic documents to paper based documents, and paragraph 2 sets down certain specific provisions in relation to electronic documents with qualified electronic signatures and qualified electronic- seals.

Our concern regarding paragraph 2 is based on the same concerns that we have already expressed in relation to the regulation of electronic seals: the proposal interferes in national laws by imposing a new legal effect that may not exist under national legal systems, and exacerbates the problems thus created by introducing yet another term that has not been used before, i.e. the exclusion of documents with “*dynamic features capable of automatically changing the document*”.

The Regulation will not be able to have the intended legal effect if it refers to a legal presumption of “*authenticity and integrity*”, that is, a legal presumption the exact content of which is dubious due to the lack of any already existing meaning or history under national laws. Our suggestion is to rephrase paragraph 2 in such a way as to refer directly to the legal effects of a paper document with a handwritten signature or a paper-based seal, whatever that legal effect may be in a given Member State.

Regarding the second half of paragraph 2 (“*dynamic features capable of automatically changing the document*”), we think that the Regulation should not go into this kind of detail, and omit this provision. It seems that the Regulation either (a) somehow intends to explain what “integrity” is about, but only by presenting new, more vague terms, or (b) tries to introduce some kind of narrowing down the otherwise all-encompassing term of “electronic document”.

There are certain risks regarding both of these approaches. Neither the term “document”, nor “integrity” of a document is usually defined by national laws for the paper-based world, so, in order to

have a working definition of electronic document or its integrity, one would also have to introduce the paper-based equivalent of these concepts into national laws, and build upon those national concepts. The current exclusion from the presumption of integrity builds upon fulfilling conditions of a document having dynamic features that are capable of automatically changing the document, whereas, from the point of view of integrity, the presumption should be invalidated even by a manual (non-automatic) capability of changing a document, or by any automatic change that is not built upon a dynamic feature. Therefore, we suggest changing the wording for paragraph 1 and 2 of Article 34 as indicated below.

Finally, a separate paragraph should be added to Art. 34 in order to clarify that national laws which contain legal presumptions going beyond the legal presumptions contained in Art. 34 – such as Section 371a German Civil Procedure Code – remain unaffected.

<i>Text proposed by the Commission</i>	<i>Amendments proposed by the CCBE</i>
<p><i>Article 34</i></p> <p>1. An electronic document shall be considered as equivalent to a paper document and admissible as evidence in legal proceedings, having regard to its assurance level of authenticity and integrity.</p> <p>2. A document bearing a qualified electronic signature or a qualified electronic seal of the person who is competent to issue the relevant document, shall enjoy legal presumption of its authenticity and integrity provided the document does not contain any dynamic features capable of automatically changing the document.</p> <p>[...]</p>	<p><i>Article 34</i></p> <p>1. An electronic document shall be considered as equivalent to a paper document and admissible as evidence in legal proceedings, having regard to its assurance level of authenticity and integrity not be denied legal effect and admissibility as evidence in legal proceedings solely on the grounds that it is in electronic form.</p> <p>2. A document bearing a qualified electronic signature or a qualified electronic seal of the person who is competent to issue the relevant document, shall enjoy legal presumption of its authenticity and integrity provided the document does not contain any dynamic features capable of automatically changing the document have the equivalent legal effect of a paper document with a handwritten signature written thereon or with a physical seal impressed thereon.</p> <p>[...]</p> <p>5. (new) Paragraphs 1 to 4 shall not affect Member States' entitlement to lay down in their national laws further legal presumptions related to electronic documents.</p>

4. Issues of Possible Confusion Regarding the Definition of Trust Service Providers

The CCBE notes the use in the English text of the Commission document of the phrases “Trust Services” and “Trust Service Providers”. The CCBE is concerned that this will give rise to confusion and difficulties as this terminology has been long used in the context of the trust industry, an important part of legal services in some CCBE jurisdictions. This terminology has for example been used in the context of legal services in other EU legislative instruments, notably the EU’s 3rd Anti-Money Laundering Directive⁴ and is widely used in both Member States anti-money laundering legislation and more widely internationally in national legislation. To have two unrelated groups of “trust service providers” both subject to different regulatory regimes creates an obvious risk of confusion and inefficiency. We would note that in the context of COM(2012) 238 the widely used US equivalent is

⁴ Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.

“trusted provider”. This is also a nearer equivalent of the term used in the French draft of “service de confiance” and would avoid any unnecessary confusion going forward.

5. Conclusion

As the representative organisation of around 1 million European lawyers which are users or at least potential users of electronic IDs and trust services not only as citizens but as organs of their judicial systems, the CCBE supports the Regulation and most of its provisions. However, we should stress that any legal effect that the Regulation may seek to lay down should be based on terms already existing in most of the jurisdictions of Member States, otherwise the provisions could cause uncertainty and in consequence further negatively affecting the already fragmented market of electronic IDs and trust services, and thus jeopardising the realisation of the main purpose of the regulation. The CCBE considers also that the Regulation should have due regard to the principle of subsidiarity.

It is for these reasons that the CCBE recommends, first, the omission of that section of the Regulation which proposes the introduction of electronic seals and, second, amending the provisions regarding the legal effects of electronic documents (and electronic seals, should that proposal be continued with, notwithstanding our first recommendation) so as to ensure both internal consistency within the Regulation between those provisions and the provisions regarding the legal effect of a electronic signatures, as well also as to ensure respect for the principle of subsidiarity.