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A D V O C A T E S

The 'eIDAS' Regulation & its Effect on Maltese Electronic Commerce Law

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This document does not purport to give legal, financial or tax advice. Should you require further information or legal assistance on any matter relating to e-commerce law as well as any related legal sector please do not hesitate to contact the following:

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1. Introduction

The use of technology is expanding and transforming the commercial world. It has the potential to increase the efficiency and convenience of services, ease enrolment and improve access to data. The downside to all this is that technology does not always instil a sense of confidence and trust that humans attain from face to face encounters.

Building trust in the electronic commerce sphere is not easy. It requires clearly set rules that uphold high standards, transparency and accountability, accompanied by a collective willingness to cooperate, continuous monitoring and mutual sharing of information.

On 23 July 2014, the Council of the European Union sought to realize the above, by adopting Regulation No. 910/2014 on **electronic identification and trust services** for electronic transactions in the internal market ('eIDAS Regulation')¹. The Regulation was transposed into Maltese law by means of Act XXXV of 2016. All existing Maltese provisions that were inconsistent with the eIDAS Regulation have recently been amended or repealed.

This document seeks to describe the main features of the eIDAS Regulation, and more importantly to guide the reader through the changes and effects of this Regulation on Maltese Electronic Commerce Law.

2. Overview of the eIDAS Regulation

2.1 Background

The eIDAS Regulation is not the first EU instrument to attempt to regulate the use of electronic signatures and electronic contracts. Its predecessor, Directive 1999/93/EC adopted on 13th December 1999 ('Directive'), had already provided a basic legal framework on the matter.

The Directive was however criticized for not managing to create a harmonized EU framework². This was largely due to it being a directive, which of its nature allows Member States to interpret

¹ OJ L 257, p 73–114.

² eIDAS Regulation, Recital 3 and 4:

the laws and adopt their own limitations and restrictions. This led to a fragmentation of laws among EU Member States, with some being considerably stricter than others. The Directive was also becoming outdated, failing to account for new technologies that have emerged since its entry, such as cloud computing. For these reasons, the Council decided to adopt a new Regulation (directly effective in all EU Member States including Malta) and repeal the Directive.

2.2 Main Aspects of the Regulation

In a nutshell, the eIDAS Regulation provides for a system of **mutual recognition of electronic identification** ('eID') schemes across Member States, and it also establishes a legal framework for 'trust services', electronic signatures, electronic seals, electronic time stamps, electronic documents, and electronic registered delivery services as well as certificates for website authentication.

2.2.1 eID

The Regulation introduces a system of mutual recognition of **electronic identification**. In practical terms, this means that if a public-sector body in a Member State has a system of online identification, it must acknowledge and accept the same from another Member State, provided it is of the same or higher assurance level, and has been notified to the European Commission³. Eligibility for notification of eID schemes is subject to certain conditions laid down in the Regulation⁴.

There are three different levels of assurances ranging from low, substantial, or high, and they are each defined in the Regulation⁵. If a Member State classifies an eID as having high assurance, in another Member State one can be confident that that same eID has a high assurance. This is done through a process of interoperability and cooperation devised in the Regulation⁶.

For the time being, mutual recognition of eIDs will be operating on a voluntary basis. This system will however become **mandatory as from 28 September 2018**. Moreover, the EU has no mandate over the private sector. However, in the preamble, **the Regulation appeals to Member States to encourage the private sector to voluntarily use eID** under a notified scheme⁷.

2.2.2 Trust services

(3) Directive 1999/93/EC of the European Parliament and of the Council dealt with electronic signatures without delivering a comprehensive cross-border and cross-sector framework for secure, trustworthy and easy-to-use electronic transactions.

(4) The Commission communication of 26 August 2010 entitled 'A Digital Agenda for Europe' identified the fragmentation of the digital market, the lack of interoperability and the rise in cybercrime as major obstacles to the virtuous cycle of the digital economy. In its EU Citizenship Report 2010, entitled 'Dismantling the obstacles to EU citizens' rights', the Commission further highlighted the need to solve the main problems that prevent Union citizens from enjoying the benefits of a digital single market and cross-border digital services.

³ eIDAS Regulation, Article 6.

⁴ *ibid* Article 7.

⁵ *ibid* Article 8(2).

⁶ *ibid* Article 12.

⁷ OJ L 257, p 73–114 Recital 17.

The Regulation introduces ‘**trust services**’ which are typically paid services that create, verify, validate or preserve electronic devices (i.e. electronic signatures, electronic seals, electronic time stamps, electronic registered delivery services and certificates related to those services).

Trust service providers can be qualified or non-qualified. Qualified trust service providers must adhere to stricter rules provided in the Regulation⁸, but may then display the EU ‘Trust Mark’ to indicate a high level of security⁹, and will also be published on ‘Trusted Lists’ in each Member State¹⁰.

2.2.3 Electronic Signatures

The Regulation differentiates between three types of electronic signatures: standard, advanced or qualified. The main principle regarding e-signatures in the eIDAS (reflecting the core principle that already existed in the Directive and in the Maltese Electronic Commerce Act¹¹) is that they shall not be denied legal effect and admissibility as evidence in legal proceedings solely because they are in electronic form. Qualified and Advanced electronic signatures need to meet strict criteria¹², but once a Member State verifies that they meet such criteria, then such verification shall be recognized in all other Member States.

Regarding the specific changes that took place in Maltese legislation relating to e-signatures, please see Section 3 below.

2.2.4 Electronic Seals and other Electronic Devices

A new addition in the Regulation is the legal recognition of **electronic seals**. These are similar to electronic signatures, but are signature tools pertaining only to legal persons, i.e. organizations, corporate entities and the like. Once again, the Regulation creates three levels of electronic seals: standard, advanced and qualified, all of which must adhere to different criteria¹³.

The Regulation also regulates **electronic timestamps** (that act as evidence that data existed at a particular time); **electronic registered delivery services** (which ease delivery of official documents to citizens and businesses); **electronic documents** (i.e. any content stored in electronic form, in particular text or sound, visual or audio-visual recording); and **certificates for website authentication** (i.e. attestations that make it possible to authenticate a website)¹⁴.

2.3 Temporal Scope

Although the Regulation came into force in 2014, **most of the provisions of the eIDAS only took effect from 1st July 2016**. The mandatory mutual recognition of eIDs by the public sector, as previously stated, will start to apply from 28th September 2018.

⁸ *ibid*, *inter alia* Articles 20, 21, 24.

⁹ *ibid* Article 23.

¹⁰ *ibid* Article 22.

¹¹ Chapter 426 of the Laws of Malta.

¹² eIDAS Regulation, *inter alia* Articles 26, 28.

¹³ *ibid*, *inter alia* Articles 36, 38.

¹⁴ *ibid* Sections 6, 7, 8.

The Regulation also contains transitional provisions meant to ease continuity from its predecessor. For example, secure signature creation devices which had been in conformity with the Directive will now be automatically recognized as qualified electronic signature creation devices under eIDAS¹⁵.

3. The Maltese Position

Maltese laws on matters relating to the eIDAS Regulation are found in the Electronic Commerce Act (Chapter 426 of the Laws of Malta) – the ‘ECA’. Malta implemented the provisions of the Regulation by means of Act XXXV of 2016, and all existing provisions in Chapter 426 that were inconsistent with the eIDAS Regulation were consequently repealed or amended, and a number of new provisions were added.

Act XXXV of 2016 introduced various **new concepts** in order to bring Chapter 426 in line with the Regulation. These include **the introduction of electronic seals**¹⁶ and **electronic communications by registered mail**¹⁷, which were not previously incorporated into Maltese Law.

The provisions regarding electronic signatures have been deleted from Chapter 426 as these are now regulated by the eIDAS itself (which applies directly to all EU Member States, including Malta).

However, it is important to keep in mind that unless specifically provided in the law, **the provisions of the ECA and the Regulation itself do not apply to activities or areas listed in the Fifth Schedule**.¹⁸ **The activities or areas listed in the said Fifth Schedule are as follows:**

- (a) the field of taxation;
- (b) matters in relation to information society services covered by any laws relating to data protection [...]
- (c) questions in relation to agreements or practices governed by competition law;
- (d) the following activities of information society services:
 - (i) the activities of notaries or equivalent professions to the extent that they involve a direct and specific connection with the exercise of public authority,
 - (ii) the representation of a client and defence of his interests before the courts,
 - (iii) gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions;
- (e) contracts that create or transfer rights over immovable property other than leasing rights;
- (f) contracts of suretyship granted and on collateral security furnished by persons acting for purposes outside their trade, business or profession;
- (g) the law governing the creation, execution, amendment, variation or revocation of:

¹⁵ *ibid* Article 51(1).

¹⁶ Chapter 426 of the Laws of Malta: Electronic Commerce Act, Article 23(5).

¹⁷ *ibid* Article 15A.

¹⁸ As per Article 4 of Chapter 426.

- (i) a will or any other testamentary instrument;
- (ii) a trust; or
- (iii) a power of attorney;

(h) any law governing the making of an affidavit or a solemn declaration, or requiring or permitting the use of one for any purpose;

(i) the rules, practices or procedures of a court or tribunal however so described;

(j) any law relating to the giving of evidence in criminal proceedings;

(k) any contracts governed by family law.

Therefore, for these activities or areas, one may not make use of electronic measures regulated by the Electronic Commerce Act or even the eIDAS Regulation itself.

The amending act ensures interoperability between Maltese service providers and those in other Member States through the introduction of new provisions: Articles 8A to 8H. Nevertheless, the ECA allows for derogations from this requirement of interoperability within the internal market if it poses a serious and grave risk of prejudice to core societal values, i.e. public policy, protection of public health, public security, and protection of consumers.¹⁹ Any measure must be taken as a last resort, and must be proportionate to the objective it tries to protect. Moreover, unless the matter is too urgent to merit this requirement, the Member State about to take such measure must notify both the European Commission and the Member State in which the service provider is established, of its intention to take such measure.²⁰

Even before the implementation of the Regulation, each Member State, including Malta, had to set up a competent national authority to supervise trust service providers. The Malta Communications Authority took over this role in the Maltese Islands²¹. The responsibilities of the competent regulator are laid down in the new Articles 23A, 23B and 23C. The competent regulator will also act as an investigator for disputes that may arise between a service provider and a consumer, and may issue compliance orders of its own initiative or upon a written application by a qualified entity²².

Article 24 of the ECA relating to offences and their respective penalties has also been amended. Unlike the situation before Act XXXV, not all infringements shall remain punishable by criminal sanctions. Only breaches to certain Articles of the Regulation²³ will be considered criminal offences. Any person who infringes other provisions shall only be liable to civil sanctions. One should also note the slight amendments with regards to the penalties. The amounts relating to fines have been rounded up to the nearest whole number, and **imprisonment may now be for up to two years** (previously, the maximum was six months).

¹⁹ Ibid Article 8B.

²⁰ Ibid Article 8B (4) and (5).

²¹ Ibid 6th Schedule.

²² Ibid Articles 24A -24K.

²³ Namely Articles 20, 22, 23, of the Act or Articles 19(2), 20(1), 21(1), 21(3), 23 and 24 thereof.

4. Future Developments

The EU is aiming towards the achievement of a digital single market for businesses and consumers²⁴. The transposition of eIDAS in Member States is only the first step towards achieving this goal. The Regulation has paved the way for the implementation of electronic services in the commercial world, making Europe the first and only region to have an effective legal framework for digital services²⁵. The way forward is to create an interest in the Regulation across all sectors, and to maintain an operational cooperative framework among Member States.

5. Conclusion

Although the Regulation has pioneered interoperability of electronic services across Member States, when it comes to substantive law it has not made any significant amendments. Therefore, apart from the addition of the recognition of some electronic devices or measures, such as electronic seals and electronic registered delivery services, as well the addition of an operational supervisory framework, Maltese Law regarding electronic devices has, to a large extent, remained the same.

The aim of the eIDAS Regulation was not primarily to change the existing substantive laws, but rather, to update them, and more importantly to remove barriers leading to the fragmentation of electronic commerce laws at EU level, thereby leading us closer towards a fully integrated digital single market.

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²⁴ Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Single Market Strategy for Europe COM/2015/0192.

²⁵ Andrea Servida, *The eIDAS Regulation and the Digital Single Market*.

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