Notaries of Europe

Providing legal certainty

Proposal of the European Commission 2021/0136 (COD) 3 June 2021

"Revision of the eIDAS Regulation - European Digital Identity (EUid)".

Feedback Statement of the CNUE

The Council of the Notariats of the European Union (CNUE) is the European umbrella organisation representing 22 national Notary Chambers and more than 45,000 notaries.

The CNUE is following with great interest the **initiative** taken by the European Commission within the framework of the **roadmap "*Revision of the eIDAS Regulation - European Digital Identity (EUid)"*** which aims to improve the effectiveness of the eIDAS Regulation, extend its application to the private sector and promote trusted digital identities for all European citizens. The CNUE appreciates the **proposal** adopted by the European **Commission** for a regulation of the European Parliament and of the Council amending Regulation (EU) No 910/2014 as regards establishing a framework for a European Digital Identity.

Against the backdrop of an ever-increasing digitalisation in many areas of life and the economy, the Commission proposal fortunately provides that **all Member States must offer their citizens eIDs that can be used across borders**. This will allow to better use the potential of electronic identification and authentication under the eIDAS Regulation which has been unexploited so far. Due to the fact that the introduction of a cross-border eID under the eIDAS Regulation has so far only been possible on a voluntary basis, only 14 out of 27 Member States offer such an eID. This means that currently only 59% of all EU citizens have access to a cross-border eID. Therefore, online services that are available in their countries can therefore only be accessed to a very limited extent in a cross-border context via the eIDAS network. The Member States' obligation to introduce cross-border eIDs will provide an important contribution to the establishment of **the Digital Single Market**.

In CNUE's view, this progress should be tackled resolutely, but not hastily. Above all, it is important that a **trustworthy, secure and easily accessible system** for managing identities in the digital space is available **across the EU,** enabling identification, authentication and the provision of attributes, diplomas and certificates.

CNUE also considers some aspects in the Commission proposal to be very critical. These will be pointed out as follows:

1. **Reservation for national formal requirements unclearly formulated**

First, the **unclear new wording of Art. 2(3) of the Commission proposal** is a matter of great concern.

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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 notarized. This reservation regarding the legal form in Art. 2 (3) is uncontroversial and has not been called into question by the Commission.

The current version of Art. 2 (3) consequently reads as follows:

> *"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 form."*

The new eIDAS proposal now includes the qualified electronic attestation of attributes in **Recital 27 and Art. 45a et seq.** Such attributes may include a driver's license, a diploma or a medical license. The electronic attestation of such attributes may be stored in the Wallet. The Regulation sets out requirements so that the electronic attestations can be recognized in other Member States as being equivalent to paper form attestations. This will be a crucial improvement for the freedom of movement within the EU and the everyday-life of many citizens.

However, 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 license 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 two amendments to Art. 2 (3) eIDAS ***highlighted*** as follows:

> *"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."***

However, it is not only systematically wrong and confusing but also unnecessary to "mix" both form reservations in a single new provision. **Art. 2 (3) and Recital 19** on the one hand and **Recital 27** on the other 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 amendments lead to an unclear, hardly comprehensible wording of Art. 2 (3), even more so since Recital 19 (previously 21) remains unchanged.

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- 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.

- It is easy and should be uncontroversial to avoid this unnecessary legal uncertainty by (i) retaining the original form of Art. 2 (3) and (i) moving the amendments to where they belong: Art. 45c on the requirements for the qualified electronic attestation of attributes.

A suggested new wording is attached.

2. Providing for more secure identification tools

When a citizen needs to access a service provided online by a public sector body, with no direct and personal intervention of any public authority, the citizen just needs to identify himself, according to the eIDAS Regulation, with two interconnected procedures: **electronic identification** (Art. 3(1)) and **authentication** (Art. 3 (5)).

These electronic procedures are two different, but interconnected concepts, both jointly trying to make sure that the citizen who is accessing an online service is who he claims to be: first, the subject identifies himself electronically, which means that he uses his electronic identification to express, in electronic format, who he is. He sends the data to the system. Second, the system authenticates that the electronic identification is correct, so the user can access the online service.

To do so, the citizen needs the **issuance** of an electronic identification means that he can later use to identify himself electronically. Article 8 of the eIDAS Regulation sets the criteria for the three existing assurance levels of security (low, substantial and high), basic difference between them being the way in which the identity of the applicant is checked by the issuer of electronic identification. These three levels are further specified in the Implementing Regulation 2015/1502 of 8 September 2015 for both the issuance of the electronic identification means ("enrolment") and the authentication mechanism used to confirm the identity to a third party.

This identification-authentication scheme under the current proposal is thinking exclusively of citizens' access to the services that are offered entirely online and in an automated way. Therefore, eIDAS is thinking of strictly technical and electronical interactions.

But there are some other public procedures, such as the notarial authentication procedure, which require face-to-face interaction between the applicants and the public sector body that need to meet the **highest identification standards**, e.g. for property sales agreements or online formations of companies. These standards are necessary in particular to **prevent identity fraud** (e.g. by passing on electronic identification means plus PIN), to **ensure the accuracy and reliability of public registers** (e.g. national business registers and land registers) which are endowed with public faith in many Member States and to **prevent money laundering**.

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When this procedure between the public body and the citizen is performed electronically, it is not enough to rely on the identification made by a third person when the certificate was issued. Rather, the **identity and capacity must also be checked by the public body in the exact moment of using the electronic identification, to make sure that the right person is using it**. This cannot be safeguarded by the previously explained processes of electronic authentication.

In order to allow that the Regulation can also be used in the future for public procedures with the **highest identification security requirements,** the Regulation needs to combine electronic identification according to the assurance level "high" with **a complementary videoconferencing identification procedure**. The result of that combination would be a highly secure two-step identification procedure consisting of (i) the authentication via the electronic identification ensuring that a valid eID is being used; and (ii) a complementary videoconferencing identification procedure ensuring that the person that the eID has been issued to is in fact appearing in the videoconference.

Such two-step identification procedure is explicitly recognized in the Digital Tools Directive 2019/1151, Recital 22, which provides for complementary identity checks at the very moment of the online formation of a company by means of videoconferences or other online means that provide a real-time audio-visual connection. Both procedures, electronic identification and videoconferencing, should be combined in order to ensure the most reliable identification of the parties involved. To access the electronic platform, the party must first identify himself by providing an electronic identification means with the assurance level "high". In a second step, the notary, via the platform, will identify the party involved by comparing the picture in the videoconference to the party's official photograph.

To perform the second step of this identification procedure, the acting notary must be able to receive the party's recognized photo and any biometrical data from the eID and, optionally, from the national electronic identification system. The recognized photo and biometrical data should be stored in the minimum set of person identification data pursuant to Article 12(4)(a) and in the list of attributes in Annex VI. **This is significantly more secure than the conventional videoident procedure**, because there, the ID card is only held in the camera and the authenticity of the ID card cannot be checked. This combination of the current electronic identification (assurance level "high") with the aforementioned videoconferencing identification procedure significantly reduces both the risk of a manipulation of the ID card and of a use of the ID card by third parties.

The eIDAS Regulation's purpose is to serve as a **toolbox, which conclusively regulates the area of electronic identification procedures**. Such a toolbox will **only be complete if it contains that two-step identification procedure**. This procedure is necessary to provide sufficient security for important transactions, e.g. in the field of real estate and company law. In addition, it is crucial for the prevention of **money laundering**. The check of a recognized photo and any biometrical data fits well into the current eIDAS system: Implementing Regulation 2015/1502, Annex Nr. 2.1.2. already prescribes a picture check for the issuance of an electronic identification means. What is missing so far is the check of a picture during the use of the eID for identification.

We note that this two-step identification procedure does not require any changes to the framework of the three existing assurance levels and their operability. How the Member States would implement the

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videoconferencing procedure and the feature for the comparison of the photo would be up to them and does not to be addressed in the eIDAS Regulation.

A suggested new wording is attached.

If the two-step identification procedure is not introduced in the eIDAS Regulation, the Regulation at least needs to provide for an **opening clause** to give Member States the possibility to foresee picture checks where necessary. However, this would deprive the eIDAS Regulation of its conclusive toolbox character and is therefore less recommended. Otherwise, in any subsequent Union legal act that foresees electronic identification, such as the proposed AML Regulation, must provide for such an image comparison procedure.

In such case, a provision similar to those of Recital 22 of the Digitals Tools Directive 2019/1151 would have to be introduced in the eIDAS Regulation regarding any digital procedure for which additional identity, capacity and legality checks are required by European or national law. The following wording is proposed, which should be introduced in Art. 2(3) or, at least, as a Recital:

> *"This regulation fully respects the legal provisions of Member States enabling their competent public authorities to verify, by complementary electronic controls of identity, legal capacity and legality, whether all the conditions required for the conclusion and validity of contracts are met. Such controls could include, inter alia, video-conferences or other online means that provide a real-time audio-visual connection".*

Lastly it is pointed out that a public authority (such as a notary) always has and should retain the authority to request the person involved to appear in person to verify the identity of the person and the will and competence for desired legal acts. We propose to include in the Regulation that in the case of certain legal acts (such as notarial authentic acts) physical presence may be deemed necessary because it is in the best interest of the person(s) concerned. In such case that person may be requested to appear physically. Therefore, we propose to add a new paragraph 4 to Article 8:

> *"In case of the highest assurance level, a public authority can refuse the identification and request an in-person identification when in doubt about the identity or competence of the person being identified".*

3. European Digital Identity Wallet

CNUE appreciates the introduction of the so-called "**European Digital Identity Wallet"** as outlined by the Commission proposal. It will store personal identification data and attributes for the use of private and public online procedures and will significantly facilitate electronic identification. The European Digital Identity Wallet will primarily be used **for secure identification in case of online services**.

CNUE particularly welcomes the fact that the European Digital Identity Wallet will only be **issued** if **identification** has taken place in **accordance with the security level "high"** (Art. 8 eIDAS Regulation). This is a crucial contribution to ensuring security and trustworthiness in the digital domain.

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However, the introduction of the European Digital Identity Wallet **does not change the general scheme.** First, the **reservation for national formal requirements pursuant to Art. 2 (3) eIDAS Regulation** also applies to the European Digital Identity Wallet. Secondly, **the sole use of the European Digital Identity Wallet is not sufficient** if a Member State imposes **higher requirements for identification in case of online services.** Consequently, identification by means of the European Digital Identity Wallet is not sufficient for the authentication procedure and other public-law procedures following the highest identification requirements. In fact, the European Digital Identity Wallet is only a way to facilitate and simplify the access to online services that require at the most the security level "high" for identification purposes.

If identification by means of the European Digital Identity Wallet should **also** apply to **procedures with the highest identification requirements**, CNUE suggests that the issuance of the European Digital Identity Wallet should be linked to the highest identification level (see point 2. dealing already with the combination of electronic identification according to the assurance level “high” with a complementary videoconferencing identification procedure).

In any case, it would be laudable to include a **clear definition of the scope of application** of the European Digital Identity Wallet in the eIDAS Regulation.

4. The use of pseudonyms

CNUE is also reluctant as regards **Art. 5 of the Commission proposal**, according to which the use of pseudonyms in electronic transactions shall not be prohibited. It is appreciable that the proposal contains a reservation concerning the legal effects that pseudonyms have under national law. Art. 5 of the Commission proposal states accordingly:

> *“**Without prejudice** to the legal effect given to pseudonyms under national law, [...]”.*

However, it would be convenient to limit the use of pseudonyms at European level in order to **curb the lack of transparency** and the risk **of abuse** associated with the use of pseudonyms from the outset.

5. EU list for certified advanced electronic signatures

CNUE notes with regret that the new eIDAS Regulation proposed by the Commission does not contain provisions according to which – following the example of qualified electronic signatures – the **Commission** has to establish, publish and keep a **list of certified advanced electronic signature creation devices** after the Member States have notified these signature creation devices.

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By introducing a so-called EU list for advanced electronic signatures as well, the reliability of these signatures could also be easily checked. This is vital, not least because advanced electronic signatures are mostly used in key areas.

6. Conclusion

In the light of the above, the proposal **should be revised precisely**.

Furthermore, it is necessary to carefully reconsider the **short deadline** for the implementation of the eIDAS Regulation and its functions in the respective Member States. This deadline **is only 12 months** and would hardly be manageable for many Member States. Large online companies, such as Google, Amazon, Facebook or Apple, are likely to have the necessary technical and financial resources to notify their services. This bears the risk that the market, in the absence of state services available in time, will increasingly switch to private services. Especially for services that are inherently governmental (e.g. jurisdiction), identification carried out by private entities alone would be very alarming. Such a trend would also go against the objectives of the Digital Services Act Package.

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