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STANDING COMMITTEE OF THE EFTA STATES

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SUBCOMMITTEE II ON FREE MOVEMENT OF SERVICES AND CAPITAL

EEA EFTA Comment

on 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)

1. PREFACE

1. The EEA EFTA States, Iceland, Liechtenstein and Norway would like to take the opportunity to comment on 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, presented by the Commission on 4 June 2012.
2. The EEA EFTA States share the Commission's view that enhancing trust in electronic transactions and strengthening the conditions for cross-border e-commerce are important for the functioning of the Internal Market. The idea of ensuring mutual recognition and the acceptance of electronic identification and electronic trust services across borders is welcomed by the EEA EFTA States. They believe that the proposed regulation will be an important tool for strengthening public electronic services and the European Digital Single Market.
3. The EEA EFTA States are concerned about the complexity of the proposed regulation which would undermine legal certainty and clarity. It remains to be seen how the regulation would be implemented and enforced. The proposed regulation foresees too many "delegated acts" and "implementing acts", making it even more difficult to assess its impact.
4. The EEA EFTA States also question the distinction made in the proposal between electronic authentication and trust services, especially when it comes to control and supervision. It appears that authentication services would not be subject to any harmonised control or supervision, except for the provisions in Chapter II, which focuses on mutual acceptance.

5. The EEA EFTA States have noticed that the proposed regulation restricts Member States in choosing mandatory technical requirements in the public sector other than those listed in the annex to the regulation. Article 3 paragraph 7 of Directive 1999/93/EC gives the possibility to define specific requirements for public sector service delivery. In line with that provision, both Iceland and Norway have developed detailed requirements for PKI-based electronic identification and electronic signature solutions which all suppliers need to fulfil if they are to deliver such services in the public sector. The EEA EFTA States are of the opinion that it should be possible to maintain national requirements as just described.

2. CHAPTER II – ELECTRONIC IDENTIFICATION

2.1. Security assessment levels

6. The EEA EFTA States are of the opinion that the proposal lacks a clear description of the security levels that need to be applied when notifying electronic identifications. Some service sectors deal with more sensitive issues than others, for example health services. Consequently, these services require higher security levels than other services. It would become problematic if sensitive services needed to accept notified schemes applying a lower security level than required under national law.
7. The EEA EFTA States are thus of the opinion that the proposal shall not prevent Member States from taking necessary measures to ensure that their national standards for identification and access to sensitive information are met. Basic principles for determining security assessment levels, such as in the Quality authenticator scheme (project under the Secure Identity Across Borders Linked 2.0 (STORK)), could be included in the proposed regulation. This would make the regulation more transparent. These principles could be defined on the basis of functional and risk-based assessment, rather than on the basis of specific and technical demands, as different technical solutions may produce similar levels of security.

2.2. The issuance of electronic identity

8. The EEA EFTA States are of the opinion that defined measurable requirements for the issuance of electronic identities are necessary, as is the case today for the issuance of passports. Security principles deployed by Frontex could serve as a useful model. The EEA EFTA States are of the opinion that the absence of such requirements would jeopardise the quality of and trust in digital identities.

2.3. Authentication services

9. The EEA EFTA States agree that the notifying Member States should ensure the availability of an authentication possibility online at any time as is stated in Article 6(d). The clause stipulates that this possibility is free of charge so that any relying party can validate the person identification data. This means in effect that the Member States must compensate the trust service provider if he requires payment for his service. In Article 19(4) the trust service provider is required to provide validity or

revocation status of qualified certificates issued by him free of charge. The EEA EFTA States would like to see this defined more clearly to avoid unnecessary thresholds in cross-border trust services and to ensure healthy competition and free circulation of trust services and products in the internal market.

3. CHAPTER III – TRUST SERVICES

10. The EEA EFTA States welcome the broadening of the scope of the proposed regulation, which will cover different types of trust services such as electronic seals and website authentication. Common rules and criteria contribute to predictability in relation to new commercial activities. The EEA EFTA States are of the opinion that it is important that the new provisions do not create unnecessary obstacles to existing and new services.

3.1. Identity control

11. The EEA EFTA States consider the assurance of the link between the end user and the qualified certificate to be essential for the use of trust services. The requirements in the proposal are set to maintain this, including requirements of physical appearance of a natural person or of an authorised representative of the legal person (Article 19). The EEA EFTA States consider it sufficient that the natural or legal person has identified him or herself by physical appearance on an earlier occasion, for example by opening a bank account where the identity control process meets the requirements set out in the Regulation. The EEA EFTA States also welcome the possibility of remotely, using electronic identification means under a notified scheme issued in accordance with Article 19(1)(a), as this will facilitate certificate renewals electronically. For additional security of identification, that may be required for certain online applications, unconditional requirement for physical appearance may be posed.

3.2. Liability and limitation of the value of the transaction

12. Article 9 sets out the rule on liability both for qualified and non-qualified trust service providers. The wording is partly based on the existing Article 6 of Directive 1999/93/EC and extends entitlement to compensation of damage caused by any negligent trust service provider. The EEA EFTA States regret that the possibility no longer exists to indicate in the qualified certificate a limit on the value of the transaction for which the certificate can be used (paragraph 4 of Article 6 of Directive 1999/93/EC). The certification service providers are according to this not liable for damage arising from use which exceeds the limit placed on the certificate. Without this possibility the trust service providers may have to make a risk adjustment, which could lead to more expensive services and create a barrier for using such services. It is not clear to the EEA EFTA States whether this possibility is maintained in Article 19(2)(c). Thus, the EEA EFTA States would like to see a clause closer resembling Article 6 of Directive 1999/93/EC that takes into account the situation described above.

13. Furthermore, it should be noted that practice from surveillance authorities shows that trust service providers that issue qualified certificates have had problems to define the “appropriate” liability scheme and to obtain necessary insurance for their operations.
14. It is common practice, in many cases, that there is no upper limit for the value of the transaction for which the certificate can be used. “No limit value” to the liability of a trust service provider means there is a need for a “no limit value liability scheme” and such schemes are difficult to obtain from insurance companies, especially for small trust service providers. Subsequently it has been problematic for smaller trust service providers of qualified certificates to obtain and sign an “appropriate liability scheme”. Therefore it seems necessary to define or regulate the values necessary for the protection of any person that seeks to use qualified certificates and not to leave this matter fully open ended as is the case in the present text of the proposal.
15. The Member States and their supervisory authorities cannot define such “limit values” without a sound legal base for them. This legal base has to be provided in the new regulation on trust services. The EEA EFTA States therefore underline that there is a need to explicitly define the limit values that are considered “appropriate” for trust service providers, cf. Article 19 (2) (b) of the draft regulation.
16. The EEA EFTA States would like to see this problem of liability and the values necessary for trust service providers be solved within the legal text of the proposed regulation.

3.3. Supervision

17. The EEA EFTA States welcome the chapter on supervision in the proposed regulation. The EEA EFTA States consider that regular and thorough supervision of the trust service providers is essential in order to achieve secure services for electronic communication.
18. The proposed regulation suggests frequent and thorough audits (Chapter III, Section 2). These can be a challenge both for trust service providers to conduct and for supervisory bodies to follow up on. Yearly audits of the qualified trust service providers to confirm compliance with the regulation are extensive and expensive. The EEA EFTA States are of the opinion that it is important to maintain a balance between the need for secure services on the one hand, and the need for supervision and revision on the other. This must also be seen in conjunction with the other provisions in Chapter III, Section 2. The proposal contains provisions that allow supervisory bodies to audit the qualified trust service providers at any time, in order to confirm that they meet the conditions contained in the regulation. Supervisory bodies may perform their own audits or have audits carried out by a recognised independent body based on the reporting obligations of trust service providers concerning security breaches.
19. Against this background, the EEA EFTA States are of the opinion that Article 16 on the supervision of qualified trust service providers should be modified in a way that qualified trust service would only be required to report biennial (instead of yearly). This would make it possible to follow up on previous audits and to prepare for the next

one as well as being less burdensome and less costly for the trust service providers and supervisory authorities and would not jeopardise security.

3.4. Legal effects of trust services

20. The EEA EFTA States consider that Article 20 of the proposed regulation, concerning electronic signatures, needs to clarify that national legislation can regulate which transactions can be signed electronically, as is done under Directive 1999/93/EC (Article 5). The EEA EFTA States find that the same should apply to electronic seals. This could for instance be explained in the preamble of the proposed regulation.

3.5. Accessibility

21. The EEA EFTA States support the inclusion of the provision on trust services for people with disabilities (Article 12). However, the EEA EFTA States are of the opinion that the provision is too vague. The EEA EFTA States would like to point out the recent proposal for a directive on the accessibility of public sector bodies' websites (COM(2012) 721). It seems reasonable to link these two proposals, at least with regard to public sector bodies that deliver electronic services requiring the use of trust services. For the use of trust services in general the EEA EFTA States would like to suggest the insertion of a paragraph stating that "these services shall be made accessible for persons with disabilities whenever it is cost-effective".

3.6. Administrative charges

22. The EEA EFTA States would also like to make clear that a new regulation will indeed increase administrative costs in respect to the supervision of trust service providers. Therefore in the new regulation for trust services a provision comparable with other EU regulations should be added. A clear example would be for the provisions of Article 12 (on administrative charges) and Article 13 (on fees for rights of use and rights to install facilities) of the Directive 2002/20/EC on the authorisation of electronic communications networks and services (Authorisation Directive). The proposed regulation should clearly provide for an explicit legal basis for the administrative costs of Member States which will be incurred in the management, and enforcement of the new provisions of the regulation as well as rights and specific obligations as referred to in the proposed regulation. These may include costs for international cooperation, harmonisation and standardisation, market analysis, monitoring compliance and other market control, as well as regulatory work involving preparation and enforcement of secondary legislation and administrative decisions; such as, decisions on access and other foreseeable administrative costs for the supervisory authorities of the Member States.
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