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NOTE

from: Presidency
to: Delegations

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Subject: 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
- *Cluster 2 (Articles 9 to 19)*

In view of the Telecommunications Working Party on 17 April, delegations will find at Annex a revised text on cluster 2 (Articles 9 to 19) on trust services: general provisions and supervision.

The proposed changes reflect the discussions held in the Working Party meetings and the delegations' written comments submitted in relation to cluster 2.¹

Besides improving the general readability of the text the main changes proposed include:

- simplifying the provision on liability and providing for a possibility of liability limitations:
Article 9;

¹ While acknowledging that the meaning of some provisions in the original text is not always clear, the Presidency has not sought to clarify all provisions at this stage but rather has focussed on substantive issues.

- simplifying the provision on trust service providers from third countries and introducing a reciprocity obligation: Article 10;
- streamlining and clarifying provisions concerning the supervision body and mutual assistance: Articles 13 and 14;
- including a new provision in Article 13(2a), which provides a missing link in relation to the obligation of qualified trust service providers to have termination plans according to Article 19(2)(h);
- replacing 'security audits' by 'conformity assessments' and 'independent recognised bodies' by 'conformity assessment bodies': Article 15;

N.B. This terminology is in line with Regulation 765/2008 on accreditation and market surveillance. If this change is accepted, it shall be complemented with an explanatory recital referring to the Regulation 765/2008 and a corresponding definition in Article 3.

- clarifying consequences in cases where qualified trust service providers do not remedy failures indicated in the conformity assessment report: Article 16(4);
- reversing the order of events in relation to the initiation of qualified trust services - qualified trust service providers may start providing qualified trust services only after the verification of compliance by the supervisory body: Article 17;
- including a new provision concerning a certificate database in Article 19(2)(k) in order to provide a link to paragraph 3 of the same Article;
- clarifying the provision on the revocation of certificates by qualified trust service providers: Article 19(3).

CHAPTER III

TRUST SERVICES

Section 1

General provisions

Article 9

Liability

1. ~~A~~ Trust service providers shall be liable **under national law** for any direct damage caused to any natural or ~~legal~~ **non-natural** person due to failure to comply with the obligations ~~laid down in Article 15(1) under this Regulation~~, unless the trust service providers ~~can~~ prove that ~~he~~ **they** ~~has~~ have not acted negligently.

~~2. A qualified trust service provider shall be liable for any direct damage caused to any natural or legal person due to failure to meet the requirements laid down in this Regulation, in particular in Article 19, unless the qualified trust service provider can prove that he has not acted negligently.~~

2. Subject to the following conditions, trust service providers may indicate limitations on the use of the services they provide:

- (a) they duly inform their customers in advance of those limitations, and
- (b) those limitations are recognisable to third parties.

Where trust service providers indicate limitations on the use of the services they provide in accordance with the previous subparagraph, they shall not be liable for damages exceeding the indicated limitations.

Article 10

Trust services providers from third countries

1. ~~Qualified~~ Trust services ~~and qualified certificates~~ provided by ~~qualified~~ trust service providers established in a third country shall be ~~accepted~~ **recognised** as **legally equivalent to** qualified trust services ~~and qualified certificates~~ provided by ~~a~~ qualified trust service providers established in ~~the territory of~~ the Union if the ~~qualified~~ trust services ~~or qualified certificates~~ originating from the third country are recognised under an agreement **concluded** between the Union and third countries or international organisations in accordance with Article 218 ~~TFUE~~ **TFEU**.

2. ~~With reference to paragraph 1, such a~~Agreements referred to in paragraph 1 shall ensure, in particular, that:

- the requirements applicable to qualified trust services ~~and qualified certificates provided by qualified trust service providers established in the territory of the Union and the qualified services they provide~~ are met by the trust service providers in the third countries or international organisations ~~with which agreements are concluded especially with regard to the protection of personal data, security and supervision;~~

- the qualified trust services provided by qualified trust services providers established in the Union are legally recognised by the third country or international organisation with which agreements are concluded.

Article 11

Data processing and protection

1. Trust service providers and supervisory bodies shall ~~ensure fair and lawful processing process~~ **personal data** in accordance with [Directive 95/46/EC] ~~when processing personal data.~~

2. ~~Trust service providers shall process personal data according to Directive 95/46/EC. Such~~ **Personal data** processing shall be strictly limited to the minimum data needed to issue and maintain a certificate or to provide a trust service.

3. Trust service providers shall ~~guarantee~~ **ensure** the confidentiality and integrity of data related to a person to whom the trust service is provided.

4. Without prejudice to the legal effect given to pseudonyms under national law, Member States shall not prevent trust service providers **from** indicating ~~in electronic signature certificates~~ a pseudonym instead of the signatory's name **in certificates**.

Article 12

Accessibility for persons with disabilities

Where feasible, ~~T~~trust services provided and end user products used in the provision of those services shall be made accessible for persons with disabilities ~~whenever possible~~.

Section 2

Supervision

Article 13

Supervisory body

1. Member States shall designate ~~an appropriate a supervisory~~ body established in their territory or, upon mutual agreement ~~in with~~ another Member State, ~~a supervisory body established in that other Member State, which body shall be~~ under the responsibility of the designating Member State. Supervisory bodies shall be given ~~all supervisory and investigatory powers~~ adequate human and financial resources ~~that are necessary~~ for the exercise of their tasks.

1a. Member States shall notify to the Commission the names and the addresses of their respective designated supervisory bodies.

2. The ~~tasks of the~~ supervisory body shall be ~~responsible for the performance of~~ the following tasks:

- (a) ~~monitoring to ensure that~~ trust service providers established in the territory of the designating Member State ~~to ensure that they~~ fulfil the requirements laid down in ~~Article 15 this Regulation;~~
- (b) ~~undertaking supervision of~~ to ensure that ~~qualified trust service providers established in the territory of the designating Member State and of the qualified trust services they provide in order to ensure that they and~~ the qualified trust services provided by ~~them~~ qualified trust service providers meet the ~~applicable~~ requirements laid down in this Regulation;
- (c) ~~ensuring that relevant information and data referred to in point (g) of Article 19(2), and recorded by qualified trust service providers are preserved and kept accessible after the activities of a qualified trust service provider have ceased, for an appropriate time with a view to guaranteeing continuity of the service.~~

2a. For the purposes of ensuring continuity of the service, the supervisory body may adopt provisions on termination plans in cases where the qualified trust service providers cease their activities.

3. ~~Annually, by the 31st March, Each~~ supervisory body shall submit ~~to the Commission a yearly report on its previous the last~~ calendar year's ~~supervisory activities to the Commission and Member States by the end of the first quarter of the following year. It shall include at least:~~

- (a) ~~information on its supervisory activities;~~
- (b) ~~together with~~ a summary of breach notifications received from trust service providers in accordance with Article 15(2);

~~(e) — statistics on the market and usage of qualified trust services, including information on qualified trust service providers themselves, the qualified trust services they provide, the products they use and the general description of their customers.~~

3a. The Commission shall make the yearly report referred to in paragraph 3 available to Member States.

~~4. Member States shall notify to the Commission and other Member States the names and the addresses of their respective designated supervisory bodies.~~

~~5. The Commission shall be empowered to adopt delegated acts, in accordance with Article 38, concerning the definition of procedures applicable to the tasks referred to in paragraph 2.~~

6. The Commission may, by means of implementing acts, define the ~~circumstances~~, formats and procedures for the report referred to in paragraph 3. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 39(2).

Article 14

Mutual assistance

1. Supervisory bodies shall cooperate with a view to exchange good practice. ~~and provide each other, within the shortest possible time, with relevant information and~~ A supervisory body shall, upon a justified request from another supervisory body, provide that body with mutual assistance so that ~~their~~ activities can be carried out in a consistent manner. Mutual assistance ~~shall~~ **may** cover, in particular, information requests and supervisory measures, such as requests to carry out inspections related to the ~~security audits conformity assessment reports~~ as referred to in Articles 15, 16 and 17.

2. A supervisory body to which a request for assistance is addressed may ~~not~~ refuse ~~that request to comply with it unless under any of the following conditions:~~

- (a) ~~if the supervisory body is not competent to deal with the request provide the requested assistance; or~~
- (aa) **the requested assistance is not proportionate to standard supervisory activities of the supervisory body;**
- (b) ~~compliance with providing~~ the requested assistance would be incompatible with this Regulation.

3. Where appropriate, **Member States may authorise their respective** supervisory bodies ~~may~~ to carry out joint investigations in which staff from other Member States' supervisory bodies is involved. **The arrangements and procedures for such joint investigations shall be agreed and established by the Member States concerned in accordance with their national laws.**

~~The supervisory body of the Member State where the investigation is to take place, in compliance with its own national law, may devolve investigative tasks to the assisted supervisory body's staff. Such powers may be exercised only under the guidance and in the presence of staff from the host supervisory body. The assisted supervisory body's staff shall be subject to the host supervisory body's national law. The host supervisory body shall assume responsibility for the assisted supervisory body staff's actions.~~

~~4. The Commission may, by means of implementing acts, specify the formats and procedures for the mutual assistance provided for in this Article. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 39(2).~~

Article 15

Security requirements applicable to trust service providers

1. Trust service providers ~~who are established in the territory of the Union~~ shall take appropriate technical and organisational measures to manage the risks posed to the security of the trust services they provide. Having regard to ~~state-of-the-art the latest technological developments~~, these measures shall ensure that the level of security is **appropriate commensurate** to the degree of risk. In particular, measures shall be taken to prevent and minimise the impact of security incidents and inform stakeholders of ~~the~~ adverse effects of any incidents.

Without prejudice to Article 16(1), ~~any~~ trust service providers ~~may~~ **shall** submit ~~to the supervisory body the a conformity assessment report of a security audit~~ carried out by a **recognised independent conformity assessment** body ~~to the supervisory body~~ to confirm that appropriate security measures have been taken.

2. Trust service providers shall, without undue delay and ~~where feasible~~ not later than 24 hours after having become aware of it, notify the ~~competent~~ supervisory body **and, where appropriate, other relevant bodies, such as** the competent national body for information security **and other relevant third parties such as or the** data protection authorities, of any breach of security or loss of integrity that has a significant impact on the trust service provided and on the personal data maintained therein.

Where appropriate, in particular if a breach of security or loss of integrity concerns two or more Member States, the **notified** supervisory body ~~concerned~~ shall inform ~~the~~ supervisory bodies in ~~other the concerned Member States and the European Network and Information Security Agency (ENISA).~~

The **notified** supervisory body ~~concerned~~ **may shall also** inform the public or require the trust service provider to do so, where it determines that disclosure of the breach is in the public interest.

3. ~~Annually, T~~the supervisory body shall provide ~~to ENISA and~~ to the Commission ~~once a year~~ ~~with~~ a summary of breach notifications received from trust service providers. ~~The Commission may communicate this summary to the European Network and Information Security Agency (ENISA).~~

4. In order to implement paragraphs 1 and 2, the ~~competent~~ supervisory body shall have the power to ~~issue binding instructions to impose obligations on~~ trust service providers.

~~5. The Commission shall be empowered to adopt delegated acts, in accordance with Article 38, concerning the further specification of the measures referred to in paragraph 1.~~

5. The Commission may, by means of implementing acts, define **further specification of the measures referred to in paragraph 1** and the circumstances, formats and procedures, including deadlines, applicable for the purpose of paragraphs ~~1 to 3~~ **2**. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 39(2).

Article 16

Supervision of qualified trust service providers

1. ~~Q~~qualified trust service providers shall be audited, **annually, at their own expense** by a ~~recognised independent conformity assessment~~ body ~~once a year~~ in order to confirm that they and the qualified trust services provided by them fulfil the requirements set out in this Regulation, and ~~they~~ shall submit the resulting ~~security audit conformity assessment~~ report to the supervisory body.

2. Without prejudice to paragraph 1, the supervisory body may at any time audit the qualified trust service providers to confirm that they and the qualified trust services provided by them ~~still~~ meet the conditions set out in this Regulation, ~~either on its own initiative or in response to a request from the Commission.~~ **Where personal data protection rules appear to have been breached,** ~~T~~the supervisory body shall inform the data protection authorities of the results of its audits, ~~in case personal data protection rules appear to have been breached.~~

3. The supervisory body shall have the power to ~~issue binding instructions~~ **require** qualified trust service providers to remedy any failure to fulfil the requirements indicated in the ~~security audit conformity assessment~~ report.

4. With reference to paragraph 3, if the qualified trust service provider does not remedy any such failure within a time limit set by the supervisory body, ~~it~~ **the supervisory body** shall ~~lose its~~ **withdraw** its qualified status and ~~be informed by the supervisory body that its status will be changed accordingly in~~ **amend** the trusted lists referred to in Article 18 **accordingly**. ~~The~~ **The** supervisory body shall inform the trust service provider of the withdrawal of its qualified status.

~~5. The Commission shall be empowered to adopt delegated acts in accordance with Article 38 concerning the specification of the conditions under which the independent body carrying out the audit referred to in paragraph 1 of this Article and in Article 15(1) and in Article 17(1) shall be recognised.~~

~~6. The Commission may, by means of implementing acts, define the circumstances, procedures and formats applicable for the purpose of paragraphs 1, 2 and 4. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 39(2).~~

Article 17

Initiation of a qualified trust service

~~1. **Qualified** Where trust service providers intend to start providing qualified trust services, they shall ~~notify~~ submit to the supervisory body a **notification** of their intention ~~to start providing a qualified trust service and shall submit to the supervisory body a security audit together with a conformity assessment report~~ carried out by a ~~recognised independent conformity assessment body~~, as provided for in Article 16(1). **Qualified trust service providers may start to provide the qualified trust service after they have submitted the notification and security audit report to the supervisory body.**~~

~~2. Once the relevant documents are submitted to the supervisory body according to paragraph 1, the qualified service providers shall be included in the trusted lists referred to in Article 18 indicating that the notification has been submitted.~~

3. The supervisory body shall verify the compliance of the **qualified** trust service provider and of the **qualified** trust services provided by it with the requirements of this Regulation, in particular with the requirements provided for qualified trust services providers. If the supervisory body concludes that the trust service provider and the trust services provided by it comply with those requirements, ~~T~~the supervisory body shall ~~indicate~~ **grant** the qualified status ~~of~~ to the **qualified** trust service providers and the **qualified** trust services ~~they~~ it provides and indicate such status in the trusted lists referred to in Article 18 ~~after the positive conclusion of the verification~~, not later than one month after ~~the notification has been done~~ in accordance with paragraph 1.

If the verification is not concluded within one month, the supervisory body shall inform the qualified trust service provider specifying the reasons ~~of~~ for the delay and the period ~~by~~ within which the verification shall be concluded.

~~4. A qualified trust service which has been subject to the notification referred to in paragraph 1 cannot be refused for the fulfilment of an administrative procedure or formality by the concerned public sector body for not being included in the lists referred to in paragraph 3.~~

4. Qualified trust service providers may start to provide the qualified trust service after the status referred to in paragraph 3 has been indicated in the trusted lists.

5. The Commission may, by means of implementing acts, define the ~~circumstances~~, formats and procedures for the purpose of paragraphs 1, ~~2~~ and 3. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 39(2).

Article 18

Trusted lists

1. Each Member State shall establish, maintain and publish trusted lists with information related to the qualified trust service providers for which it is competent together with information related to the qualified trust services provided by them.

2. Member States shall establish, maintain and publish, in a secure manner, electronically signed or sealed trusted lists provided for in paragraph 1 in a form suitable for automated processing.

3. Member States shall notify to the Commission, without undue delay, information on the body responsible for establishing, maintaining and publishing national trusted lists, and details of where such lists are published, the certificate used to sign or seal the trusted lists and any changes thereto.

4. The Commission shall make available to the public, through a secure channel, the information, referred to in paragraph 3 in electronically signed or sealed form suitable for automated processing.

~~**5. The Commission shall be empowered to adopt delegated acts in accordance with Article 38 concerning the definition of the information referred to in paragraph 1.**~~

6. The Commission may, by means of implementing acts, **specify the information referred to in paragraph 1 and** define the technical specifications and formats for trusted lists applicable for the purposes of paragraphs 1 to 4. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 39(2).

Article 19

Requirements for qualified trust service providers

1. When issuing a qualified certificate, a qualified trust service provider shall verify, by appropriate means and in accordance with national law, the identity ~~and, if applicable, any specific attributes~~ of the natural or ~~legal~~ **non-natural** person to whom a qualified certificate is issued.

~~Such~~ **The information referred to in the previous subparagraph** shall be verified by the qualified service provider or by ~~an authorised~~ a third party acting under the responsibility of the qualified service provider:

- (a) by a physical appearance of the natural person or of an authorised representative of the ~~legal~~ **non-natural** person, or

- (b) remotely, using electronic identification means ~~under a notified scheme~~ issued in compliance with point (a).

2. Qualified trust service providers providing qualified trust services shall:

- (a) employ staff who possess the necessary expertise, experience, and qualifications **and who have received appropriate training regarding security and personal data protection rules** and **shall** apply administrative and management procedures which correspond to European or international standards ~~and have received appropriate training regarding security and personal data protection rules~~;
- (b) **bear with regard to** the risk of liability for damages, ~~by~~ maintaining sufficient financial resources or ~~by obtain an~~ appropriate liability insurance ~~scheme~~;
- (c) before entering into a contractual relationship, inform any person seeking to use a qualified trust service of the precise terms and conditions regarding the use of that service, **including any limitation on its use**;
- (d) use trustworthy systems and products which are protected against modification and guarantee the technical security and reliability of the process supported by them;
- (e) use trustworthy systems to store data provided to them, in a verifiable form so that:
- they are publicly available for retrieval only where the consent of the person to whom the data has been issued has been obtained,
 - only authorised persons can make entries and changes **to the stored data**,
 - ~~information the data~~ can be checked for authenticity;
- (f) take **appropriate** measures against forgery and theft of data;
- (g) record **and keep accessible** for an appropriate period of time, **including after the activities of the qualified trust service provider have ceased**, all relevant information concerning data issued and received by the qualified trust service provider, in particular for the purpose of providing evidence in legal proceedings **and for the purpose of ensuring continuity of the service**. Such recording may be done electronically;
- (h) have an up-to-date termination plan to ensure continuity of service, **where applicable**, in accordance with ~~arrangements issued~~ **provisions adopted** by the supervisory body under ~~point (e) of~~ Article 13(2a);
- (i) ensure lawful processing of personal data in accordance with Article 11;
- (k) **establish and keep updated a certificate database**.

3. ~~When Q~~qualified trust service providers issuing qualified certificates **decide to revoke a certificate, they** shall register **such revocation** in their certificate database and **publish** the revocation **status** of the certificate within ten minutes ~~after~~ **of the decision to revoke being taken**. ~~Such revocation has taken effect~~ **shall become effective immediately upon its registration in the certificate database**.

4. With regard to paragraph 3, qualified trust service providers issuing qualified certificates shall provide to any relying party information on the validity or revocation status of qualified certificates issued by them. This information shall be made available at any time at least on a certificate basis in an automated manner which is reliable, free of charge and efficient.

5. The Commission may, by means of implementing acts, establish reference numbers of standards for trustworthy systems and products **which comply with the requirements under paragraph 2, points (d) and (e), of this Article** . Compliance with the requirements laid down in Article 19 shall be presumed where trustworthy systems and products meet those standards. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 39(2). ~~The Commission shall publish those acts in the Official Journal of the European Union.~~
