



COUNCIL OF
THE EUROPEAN UNION

Brussels, 1 July 2013

11741/13

Interinstitutional File:
2012/0146 (COD)

TELECOM 186
MI 593
DATAPROTECT 85
EJUSTICE 56
CODEC 1638

NOTE

from: Presidency
to: Delegations

No. Cion prop.: 10977/12 TELECOM 122 MI 411 DATAPROTECT 73 CODEC 1576

No prev. doc. : 8304/13 TELECOM 67 MI 270 DATAPROTECT 40 EJUSTICE 27 CODEC 770

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
- *Revised Cluster 2 (Articles 9 to 19)*

1. In view of the WP TELE meeting of 11 July, delegations will find at Annex a revised text on cluster 2 (Articles 9 to 19) on trust services: general provision and supervision. The proposed changes are based on discussions held at the WP TELE meetings as well as on the written comments provided by some delegations in relation to the latest version of cluster 2 (doc. 8304/13).
2. For easier reference, the changes as compared to the original Commission proposal (doc. (10977/12) are in **bold** (and deletions in ~~strikethrough~~). The changes as compared to the latest text on cluster 2 (doc. 8304/13) are underlined. The main changes of substance are outlined below.

3. Article 9 on liability currently covers all trust service providers. Following the limitation of scope of several Articles in this cluster to qualified trust service providers, delegations are invited to express their views on the scope of Article 9 (whether non-qualified trust service providers should be covered; if yes, whether the reversed burden of proof should only be limited to qualified trust service providers as suggested by some delegations). The text of article 9(1) has been amended to clarify the meaning of liability "under national law". The text of a new recital has been also suggested.
4. With regard to trust service providers from third countries, several delegations recalled that the eSignature Directive, in its Article 7, provided for three options, while the proposed Regulation only retains the option of international agreements. Delegations are invited to express their views on whether it could be useful to maintain the other two options.
5. The Presidency considers that the protection of personal data is equally important for the entire Regulation and not only for Chapter III. Therefore it is suggested to move Article 11 to Chapter I 'General provisions' and to redraft it accordingly. The new wording will be suggested at a later stage for the purposes of discussion on Chapter I. Furthermore, taking into account the opinions of the European Data Protection Supervisor on the proposed NIS Directive and eIDAS Regulation, when it comes in particular to trust service providers, the relationship between this Regulation and Directive 95/46/EC¹ should be further explored in order to avoid possible contradictions, overlaps and unnecessary duplications. Any comments from delegations would be welcome in this respect.

¹ For example, requirements for the operators (Article 17(1) of Directive 95/46/EC and Article 15(1) of the proposed Regulation), liability regimes (Article 23 of Directive 95/46/EC and Article 9 of the proposed Regulation), the role and competences of Supervisory authorities.

6. With regard to supervision (Article 13), following interventions from and consultations with a number of delegations, the supervisory powers have been limited to qualified trust service providers. Delegations will be invited to comment on whether they see a need to envisage any supervisory tasks in relation to non-qualified trust service providers. Moreover, in order to provide for transparency, Article 13(2) now provides an exhaustive list of tasks of the supervisory body. Paragraph 2a of this article has been merged with task 2(h) and a new task (i) has been added. Delegations are welcome to consider whether additional tasks should be added.
7. Based on views expressed by delegations, Article 15(1) has been limited to qualified trust service providers but the important notification requirement in Article 15(2) remains applicable to all trust service providers.
8. Delegations raised concerns with regard to the terminology used in Article 15(4) and 16(3) on 'binding instructions'. The Presidency deleted these provisions as Article 15(4) is already covered by Article 13(1), and Article 16(3) is now covered in Article 13(2)(i).
9. Finally, the Presidency noted a certain degree of confusion with regard to what is covered by the expression of 'trust service provider'. It is the Presidency's understanding that this expression covers both qualified and non-qualified trust service providers. In order to improve the clarity of the text, it could be considered to call non-qualified trust service providers e.g. 'simple' trust service providers. If this approach is accepted it should be reflected in the corresponding definitions.
10. At the Working Party TELE on 11 July, delegations will be invited to comment on the amended text set out in the Annex. Delegations are kindly requested to submit their written comments and accompanying drafting suggestions to the chair of the LT Presidency (and to teleinfo@consilium.europa.eu) preferably by 9 July.

CHAPTER III

TRUST SERVICES

Section 1

General provisions

Article 9

Liability

1. ~~A Without prejudice to paragraph 2,~~ trust service providers shall be liable ~~under national law~~² 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.

This provision shall be applied in accordance with national rules on liability.

~~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 limit the liability set out in paragraph 1 indicate limitations on the use of the services they provide:

- (a) they duly inform their customers in advance about the of those limitations on the use of the services they provide, and
- (b) those limitations are recognisable to third parties.

² Explanatory recital on the meaning of 'under national law' could be considered: *"This Regulation provides for the liability of all trust service providers. In particular, it establishes the liability regime under which all trust service providers should be liable for damage caused to any natural or legal person due to failure to comply with the obligations under this Regulation. It allows trust service providers to limit, under certain conditions, the liability. However, this Regulation should be applied in accordance with national rules on liability. Therefore, it does not affect those rules, for example, on definition of damages, negligence, on relevant applicable procedural rules."*

~~Where trust service providers indicate limitations on the use of the services they provide conditions set out in accordance with the previous subparagraph are met, they trust service providers shall not be liable for damages arising from the use of services exceeding the indicated limitations.~~

Article 10

Trust services providers from third countries International aspects

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, and by services they provide 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 feasible³, 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** body⁴ 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~~ **have all the necessary supervisory and investigatory powers and adequate human and financial resources** 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** and the qualified trust services they provide fulfil the requirements laid down in **Article 15 this Regulation**;~~

³ Explanatory recital could clarify that the feasibility assessment should also include economic considerations made by the TSP.

⁴ Explanatory recital could clarify that there could be several supervisory bodies in one Member State. Similar approach was taken in recital 11 of the Framework Directive.

- ~~(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.~~

2. In order to ensure that qualified trust service providers established in the territory of the designating Member State and the qualified trust services they provide fulfil the requirements of this Regulation, supervisory bodies, subject to the conditions laid down in this Regulation, shall perform the following tasks :

- (a) to cooperate with other supervisory bodies and provide those bodies with assistance;**
- (b) to analyse conformity assessment reports;**
- (c) to ensure that other supervisory bodies, the public and the Commission are informed about any breach of security or loss of integrity;**
- (d) to report to the Commission about its activities;**
- (e) to carry out audit of qualified trust service providers and inform the data protection authorities about the results thereof;**
- (f) to grant the qualified status to trust service providers and to the services they provide and to withdraw this status;**
- (g) to inform the body responsible for national trusted list referred to in Article 18(3) about its decisions to grant or to withdraw the qualified status;**
- (h) to adopt provisions on termination plans in cases where the qualified trust service providers cease their activities;**
- (i) to require that appropriate action be taken by qualified trust service providers in case of their failure to fulfil the requirements of this Regulation.**

2a. — For the purposes of ensuring continuity of the service, the supervisory bodys 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); **The Commission may communicate that summary to the European Network and Information Security Agency (ENISA).**

~~(c) — 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 annual 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. **Qualified t**~~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 qualified 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.~~⁵

⁵ Deleted as overlapping with article 16(1).

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 impact⁶ on the trust service provided and or 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 concerned ~~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, Tthe 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.~~⁷

~~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).

⁶ Explanatory recital could clarify the meaning of 'significant impact'.

⁷ Deleted as already covered by article 13(1).

Article 16

Supervision of qualified trust service providers

1. ~~Q~~qualified trust service providers shall be audited, annually every 24 months, 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.~~⁸

4. ~~With reference to paragraph 3, if~~ Where the supervisory body requires the qualified trust service provider to remedy any failure to fulfil requirements under this Regulation and the ~~qualified trust service that~~ provider does not ~~remedy any such failure~~ act accordingly, ~~if applicable~~, within a time limit set by the supervisory body, ~~it~~ the supervisory body shall ~~lose its~~ withdraw ~~its the~~ qualified status ~~of that provider~~ and ~~be informed by the supervisory body that its status will be changed accordingly in~~ amend inform the body referred to in Article 18(3) for the purposes of updating the trusted lists referred to in Article 18. The supervisory body shall inform the qualified trust service provider of the withdrawal of its qualified status.⁹

~~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).~~

⁸ Included as a task in article 13(2)(i).

⁹ Article 16(4) is re-drafted taking into account the deletion of article 16(3).

Article 17

Initiation of a qualified trust service

1. ~~Qualified~~ Where trust service providers, ~~without qualified status,~~ 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 issued 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 referred to in paragraph 1 and of the ~~qualified~~ trust services provided by it with the requirements of this Regulation, in particular, with the requirements provided for qualified trust service providers. If the supervisory body concludes that the trust service provider and the trust services provided by it comply with those requirements, ~~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 inform the body referred to in Article 18(3) for the purposes of updating the trusted lists referred to in Article 18 ~~after the positive conclusion of the verification~~, not later than one three months after the notification ~~has been done~~ in accordance with paragraph 1.

If the verification is not concluded within one three months, 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 secured 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 certificates 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]¹⁰, 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 **or a qualified electronic signature or an electronic seal** **~~under a notified scheme~~** issued in compliance with point (a).

¹⁰ Possibly to be deleted as apparently in contradiction with subparagraph 2.

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

- (a) employ staff **and, if applicable, subcontractors** 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 relates** 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.~~
