e-Signing under eIDAS: a sign of strong top-down policy-making?
After nearly two decades of European policy-making in the field of e-signatures, eIDAS focuses on harmonizing the patchwork of e-signing policies. Might the EU policy-making pattern have changed?

e-Signing is a hot topic at the moment for two reasons. First, because the eIDAS Regulation provides an update of the existing rules. This has an impact on many stakeholders, among them the member states. Second, because of the growing need for secure and easy-to-use e-signing solutions in the public sector.

An electronic signature is a trust service and provides a link between the signee and the digital data in a digital way. So why do we need stringent e-signing policy or a legal framework covering this subject? This need can be quite easily demonstrated by an example in the governmental context. For example, when a citizen or civil servant receives an official government document provided with a wet signature, this person should trust the legality of this document. Accordingly, when the same person receives a digital document with an e-signature, he or she needs to have the same level of confidence.

In what follows, the origins of e-signing policy will be explored. The scope of the new policy will be compared with the old policy and the principles of “top-down” versus “bottom-up” policy-making influencing the bigger picture will be analyzed.
The origins of the EU e-signing policy

The use of e-signatures emerged together with the global digital development of the last decades. Policy on this subject originated from the United States and initiatives in this direction were since followed by a few EU member states. In the early days, the e-signature was mainly used in a business environment, which gradually created a first need for a fully-fledged legal framework.

Back in 1997, the European Community acknowledged the need for a legal framework on e-signatures. In the final days of the 20th century, the first European legal framework on e-signatures was put in place with the eSignatures Directive. Nearly 20 years later this Directive is replaced by a new legislation: the eIDAS regulation.

The eSignature Directive of 1999 provided the member states a framework from which they could fine-tune and implement their own e-signature policy. This last element is an important aspect of the Directive as legal instrument, since member states are responsible for the continuation of the policy creating process. This entails that member states in practice create their own e-signing policy. The Directive did not boost e-signing activities, neither in the public nor the private sector.

The EU Digital Agenda, which started in 2010, aimed and continues to aim the development of a digital single market. E-signatures are an important component of the digital agenda which crosses different pillars such as enhancing interoperability, standards and ICT-enabled benefits for European society. By 2011, the European Commission made the revision of the Directive one of its priorities to boost user empowerment, convenience and trust in the digital world. One year later, the Commission concluded its proposal for an update of the eSignature Directive and proposed new regulation. The aim was to enhance existing legislation and expand the scope. Eventually, the eIDAS regulation was published in the summer of 2014.
**Scope of the EU e-signing policy**

The eSignature Directive and the eIDAS Regulation have different underlying goals and varying implementation processes. Whereas the Directive provided the first legal framework, the Regulation focused on harmonizing the e-signing policies among member states.

The Directive defined the scope of electronic signatures. It used a two-tiered approach in defining the effects of e-signatures. On the one hand, stating that legal effectiveness and admissibility of e-signatures cannot be denied purely based on their digital nature. On the other hand, the Directive ensured that advanced electronic signatures based on a qualified certificate were equal to handwritten signatures. Broad requirements for the qualified certificates and their providers are stipulated in the annexes of the Directive.

eIDAS updates the Directive in several ways; the two-tiered approach remains unchanged as well as the distinction between qualified e-signatures and advanced e-signatures. eIDAS however expands the requirements stipulated in the Directive, stressing the importance of cross-border harmonization and broadening the scope from e-signing to other trust services.

An essential difference between the eSignatures Directive and the eIDAS Regulation is the legal basis. eIDAS needs to harmonize the EU-wide patchwork of differing laws caused by the Directive, which did not provide a sufficient basis for a EU-wide harmonized e-signing policy. eIDAS is therefore followed by executive acts - containing specific requirements - created by the Commission which clarify the scope and requirements to assure a harmonized implementation in the 28 member states.

**Top-down EU e-signing policy-making and its consequences**

In top-down policy-making, the centrally located actors are regarded to be decision-makers. In the European Union, these main actors are the European Commission, European Parliament and to a lesser extent the Council of the EU. The advantages of bottom-up policy-making start from the critique given to the top-down approach: local actors often have a better understanding of the specific needs and particularities - the so-called street-level bureaucracy.

Although the eSignatures Directive was created by the institutions of the European Community, the eSignatures Directive had some aspects of bottom-up policy-making. This mainly because the member states were the main implementing actors and had some elbow room in doing so. eIDAS however, shows a move towards a top-down policy making approach in this area.

First, the legalistic choice for a regulation makes eIDAS more top-down-focused than its predecessor. This means that the Commission will provide binding executive acts and the Member States lose much leeway in comparison with the eSignatures Directive. Second, eIDAS enhanced the top-down approach by using trilogues, these are informal negotiations on the proposed legislation between
key-stakeholders from the Commission, Council and Parliament (Commission, 2014). Therefore, the position of the Commission expands from initiator to co-legislator, even if trilogues are often questioned due to their lack of transparency and democratic accountability.

Furthermore, Blythe (2005) claimed that the eSignature Directive did not create a technology neutral solution. The technical requirements for advanced e-signatures, certificates and Qualified Trust Service Providers became even more stringent with eIDAS. Hence potentially harming the working of the market. Making technology better through top-down policy-making is though, ruining technological possibilities with policy-making is easy.

“[…] The Directive created a niche for itself, used by few and ignored by many.” (Dumortier & Vandezande, 2013, p.19). This quote emphasizes that ironically the goal of the eSignatures Directive was to facilitate the use of e-signatures and provide a legal framework which covers e-signatures based on qualified certificates, but the need for qualified signatures has largely been overestimated.

The eSignatures Directive missed the essence of what the market needed (Barofsky, 2000). eIDAS strengthens the focus on qualified signatures and broadens the scope of trust services, since harmonization is one of its main goals. Hence, the stronger top-down approach of eIDAS, which lacks the connection with local actors, might result in missing the market needs once again. Eventually, when eIDAS again misses the essence of what the market needs, the goal of harmonization will not be met either.

On the plus side, legal certainty is created and this will allow all Europeans to improve their trust in e-signatures. The eIDAS policy aims to create an “EU Level Playing Field”, ensuring the standardization of qualified trust services.

The culmination of eIDAS and its legislative process create difficulties for actors implementing e-signing solutions. Being aware of the peculiarities listed above will be a step into the right direction.

**Conclusion**

The eSignature Directive did not adequately respond to the needs of the private and public sector two decades ago. It is still too early to evaluate what impact the eIDAS regulation will have in this regard. What became clear is that the eIDAS Regulation has more top-down policy-making characteristics than the eSignature Directive and this has some consequences. Stringent requirements, technological lock-in and possibly ignoring market needs, will however do little to further the EU’s digital agenda and creates difficulties when implementing e-signing solutions. Whether as an enterprise, a local government or a large government department, unravelling the EU steered e-signing policy will be a hard maze to navigate without the proper support and understanding.
Sources


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