EU eIDAS Regulation

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negligent modality of its exercise.[19] An intentional or negligent act can sometimes be found solely in **vicarious agents of trust service providers**, whenever trust service providers are called upon to strictly respond according to national law, subject to all the conditions of that law and according to the provisions of the *eIDAS* Regulation, on the basis of a similar reasoning already found in Art. 11 (see Art. 11, mn. 15–19). In the German law, a clear example in that direction was present in § 11, paragraph 4 of the *Gesetz über Rahmenbedingungen für elektronische Signaturen* (*Signaturgesetz*), in which the certification service provider (*Der Zertifizierungsdiensteanbieter*) was expected to respond strictly (*wie für eigenes Handeln*) regarding vicarious agents (*beauftragte Dritte*), with an explicit derogation to the general liability of the principal (only) for his/her own fault pursuant to § 831 *BGB*.[20] A similar rule, with general reference to the trust service provider (*Vertrauensdiensteanbieter*), is currently to be found in § 6 of the *Gesetz zur Durchführung der Verordnung (EU) Nr. 910/2014 des Europäischen Parlaments und des Rates vom 23. Juli 2014 über elektronische Identifizierung und Vertrauensdienste für elektronische Transaktionen im Binnenmarkt und zur Aufhebung der Richtlinie 99/93/EG* (*eIDAS-Durchführungsgesetz*, which repealed the *Signaturgesetz*).

Furthermore, as mentioned before (see Art. 11, mn. 15–19), the already experienced application of Directive 1999/93/EC shows that, at least in the field of electronic signatures, **among the national rules** on liability, which could be applied in conjunction with European rules, an important role is played by those rules, envisaged in various systems, regarding **contributory negligence of the creditor,**[21] and it is, therefore, not difficult to imagine that it may have a similar relevance concerning the *eIDAS* Regulation.[22] Along the same line, the German doctrine[23] stated the full compatibility with the Regulation even of a particular provision (then not reproduced in the *eIDAS-Durchführungsgesetz*) of the *Signaturgesetz* (precisely the § 11, paragraph 1, 2nd sentence) which radically excluded the right to compensation for a third party who knew or ought to have known the defectiveness of indications, even though contained in particularly reliable instruments (such as a qualified certificate). **20**

Although Art. 13 does not openly state it, there is no doubt that a possible liability of the **parties using trust services** remains subject to applicable national law.[24] **21**

IV. Comparison between Art. 11 and Art. 13

Some have defined Art. 13 *rather straightforward* and Art. 11 *more interesting and questionable*, especially for the particularly serious (but not downright strict, as already **22**

[19] Which, according to a common belief, excludes the possibility of applying the discipline in question, as underlined – even if without particular reference to trust service providers – by Bianca, *La responsabilità*, p. 708 ff. cf. also Delfini, p. 156 f. With particular reference to Directive 1999/93/EC and its Italian implementing rules, Viglione, p. 26, among others, strongly questioned the possibility of applying Article 2050. Morelato, p. 465, had a different opinion concerning this debate. Cf. also Rosetti, p. 506 ff.

[20] Cf. Roßnagel, *Das Recht der Vertrauensdienste*, p. 96 ff. and 145 regarding the compatibility of the aforementioned provision of the *Signaturgesetz* with the *eIDAS* Regulation.

[21] As highlighted, with particular regard to German law, by Roßnagel, *Das neue Recht elektronischer Signaturen*, p. 1823, who states that: *§ 254 BGB findet Anwendung, wenn auf Seiten des in redlicher Weise vertrauenden Dritten ein Mitverschulden vorliegt. Dies gilt sowohl für ein Mitverschulden bei Entstehung des Schadens als auch für ein Verschulden im Hinblick auf die Schadensminderungspflicht. Ein Mitverschulden liegt regelmäßig vor, wenn der Dritte den Schaden durch Nachprüfung des Zertifikats hätte verringern oder vermeiden können.*

[22] For a position that substantially seems this one, cf., particularly with regard to Spanish law, De Miguel Asensio, p. 1015.

[23] Cf. always Roßnagel, *Das Recht der Vertrauensdienste*, p. 96 and 145.

[24] Cf. Gobert, *Le règlement européen*, p. 34.

seen) liability that this latter Article would bring to notifying Member States, which could avoid notifying the European Commission of their national electronic identification systems, thus *de facto* blocking the effectiveness of the principle of mutual recognition on which the Regulation is based on.[25]

23 Moreover, with respect to the Proposal for a Regulation of the European Commission, which, in Art. 6, provided for a broad liability only for notifying Member States, the adopted text of the Regulation provides for a *fragmentation*,[26] or, to be more precise, a **distribution**[27] **of the liability of the various actors**, given their respective contributions, so much so that some have even criticised the possibility that Member States be, instead, pressed to notify their electronic identification systems with remarkable irresponsibility since they do not fully assume their liability.[28] Such an event cannot obviously take place in the infrequent but possible hypothesis[29] in which a notifying Member State assumes the role (and therefore the related liability) also of a party issuing electronic identification means, and perhaps also of a party operating the authentication procedure.

24 In any case, **the fundamental difference between Art. 11 and Art. 13** lies in the fact that the liability regulated in the first Article can only be applied if Member States take one more step, that is, by notifying their national electronic identification systems to the European Commission, whereas the liability regulated by the second Article directly concerns, namely under the Regulation, trust service providers.[30]

25 Furthermore, also in relation to trust services for electronic transactions, the Regulation provides that **subsequent implementing acts** integrate the discipline.[31] On the one hand, this corresponds to a probably unavoidable need for this matter, where technical norms play a crucial role[32] and must continuously be updated (as seems to be considered, among others, by the general provision contained in paragraph 1 of Article 19 of the Regulation, according to which *Qualified and non-qualified trust service providers shall take appropriate technical and organisational measures to manage the risks posed to the security of the trust services they provide. Having regard to the latest technological developments, those measures shall ensure that the level of security is 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 such incidents*). On the other hand, there are many **doubts regarding law policies**, as it is now evident that technical norms are not necessarily neutral, since they are heavily influenced by big companies already dominating the market.[33]

[25] Cf. Cuijpers/Schroers, p. 8, who state that such a serious liability for the notifying Member States would be in contrast with the *market approach* which characterizes the Regulation, as clearly indicated in Recital no. 13. Cf. on the point also Popoli, p. 137.

[26] *Saucissonnage*: Gobert, *Le règlement européen*, p. 20.

[27] *Répartition*: Gobert, *L'identification électronique*, p. 97.

[28] Gobert, *Le règlement européen*, p. 21; Gobert, *L'identification électronique*, p. 99.

[29] As acknowledged by Gobert, *Le règlement européen*, p. 21. On the point cf. also Popoli, p. 136.

[30] Cf. to that effect, with reference to the Proposal for a Regulation, Spindler/Rockenbauch, p. 146.

[31] As underlined by Finocchiaro, *Una prima lettura del reg. UE*, p. 428; Buffa, p. 28; Roßnagel, *Das Recht der Vertrauensdienste*, p. 69 ff.

[32] Also in relation to the judgment of liability, as emphasised for a long time by the doctrine: cf., among others, Rosetti, p. 499 ff.; Morelato, p. 465; Finocchiaro, *I contratti informatici*, p. 129 ff.

[33] Cf. for instance Cardarelli, p. 244, according to whom *technical rules are not necessarily neutral, since they also depend on dividing procedures that follow market implementation methods, systems for the protection of intellectual property or industrial inventions; therefore, they depend on choices related to research and technology, carried out by groups with significant market power and influenced by valuable options*.

V. Conclusions concerning the rules of liability of the *eIDAS* Regulation

26 The various **liabilities** discussed above, though each with their own peculiarities, and despite the general refusal of a strict liability, seem to be, overall, **rather burdensome**, so that operators of the sector in order to deal with the risks involved – as already observed by various scholars – could be requested to make **significant investments** (especially in the case of qualified trust service providers for whom Article 24 paragraph 2 of the Regulation provides that *A qualified trust service provider providing qualified trust services shall: […] c) with regard to the risk of liability for damages in accordance with Article 13, maintain sufficient financial resources and/or obtain appropriate liability insurance, in accordance with national law […]*).[34]

27 Furthermore, the **provisions** contained in the Regulation are – as also already outlined in the doctrine – **free from a systematic nature** and very simplistic ones,[35] which, inevitably, will bring legal uncertainty, that is, different applications and interpretations by various administrators and judges of each single Member State, at least until further legislative acts of the European institutions and judgments of the Court of Justice will come into effect.

28 If all of this is true, a legitimate doubt comes up (as already mentioned *supra*, mn. 22–25, especially with regards to the importance of technical rules): that the Regulation, if successful,[36] will, in fact, end up by favouring the largest operators, namely the only ones who can face without problems the cited investments and the aforementioned uncertainty, as well as to get the medium and small size operators out of the market (or to avoid their entrance). For countries like Italy, characterized by small and medium-sized enterprises in the digital sector, the *eIDAS* Regulation is therefore more likely to be a danger rather than an opportunity. Given that *the impact of the Regulation on the Italian legal framework is limited*,[37] it is by no means certain that a similarly limited impact will also affect the economy. It is only in a few years from now that we will be able to verify the validity, or not, of such a prediction.

Article 14
International aspects

1. Trust services provided by trust service providers established in a third country shall be recognised as legally equivalent to qualified trust services provided by qualified trust service providers established in the Union where the trust services originating from the third country are recognised under an agreement concluded

[34] On this topic, for further references, cf. Cuijpers/Schroers, p. 8 ff.; Popoli, p. 141. Cf. also, in the German law, § 10 of the *eIDAS-Durchführungsgesetz*.

[35] *Systemwidrige und unterkomplexe Regelungen*: Roßnagel, *Die EU-Verordnung*, p. 3692.

[36] But, regarding the risk that the Regulation could, instead, remain a *lettre morte*, cf. Jacquemin, p. 137.

[37] Finocchiaro, *Una prima lettura del reg. UE*, p. 428; Delfini/Finocchiaro, p. 9. At least with regard to the subject of liability, this opinion appears to be perfectly in line with the modifications introduced by the Italian legislator (with the Legislative Decree no. 179 of 26 August 2016) in Article 30 of the Italian *Digital Administration Code* (Legislative Decree of 7 March 2005, no. 82): in the just mentioned Article, and in particular in the first paragraph, a more general wording from the previous one was simply included, in order to be able to refer not only to the *liability of the certifier*, but more broadly to the *liability of the qualified trust service providers, the certified e-mail managers, the digital identity managers and the custodians*. Minimal modifications were introduced also by the Legislative Decree no. 217 of 13 December 2017.

between the Union and the third country in question or an international organisation in accordance with Article 218 TFEU.

2. Agreements referred to in paragraph 1 shall ensure, in particular, that:

the requirements applicable to qualified trust service providers established in the Union and the qualified trust services they provide are met by the trust service providers in the third country or international organisations with which the agreement is concluded, and by the trust services they provide;

the qualified trust services provided by qualified trust service providers established in the Union are recognised as legally equivalent to trust services provided by trust service providers in the third country or international organisation with which the agreement is concluded.

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Content

I. Abstract

The provision in comment compares *trust services provided by trust service providers established in a third country* and *qualified trust services*. The wording of the norm induces to highlight the difference between simple and qualified trust services. In fact, since it does not specify any type of trust service exercisable by a provider residing outside the Union, the mandatory scope of the Article surely recognises them: on the one hand, the general possibility to provide simple trust services and, on the other hand, it allows, under certain specified conditions, to carry on activities aimed at creating qualified trust services. **1**

II. Relationship with Article 7 of Directive 99/93/EC: the wording of the provision previously in force

Article 14 of Regulation No. 910 of 23-7-2014 governs the circumstances in which trust services are not performed by persons residing in the European Union. It completes and enriches the provision of Art. 2 (1) of Regulation No. 910 of 23-7-2014, **2**

which, in general terms, states that the legislation in question *applies to electronic identification schemes that have been notified by a Member State, and to trust service providers that are established in the Union*, and suggests that, if providers are established outside the Union, the provisions in question are not directly applicable (see mn. 10–20 for indications regarding the reasons that explain why it does not apply to all the provisions of the Regulation).

3 Furthermore, the commented provision replaces the previously in force Art. 7 of Directive 99/93/EC, entitled *International aspects*. According to this latter provision, in particular, *1. Member States shall ensure that certificates which are issued as qualified certificates to the public by a certification service-provider established in a third country are recognised as legally equivalent to certificates issued by a certification-service provider established within the Community if: a) the certification-service-provider fulfils the requirements laid down in this Directive and has been accredited under a voluntary accreditation scheme established in a Member State; or b) a certification-service-provider established within the Community which fulfils the requirements laid down in this Directive guarantees the certificate; or c) the certificate or the certification-service-provider is recognised under a bilateral or multilateral agreement between the Community and third countries or international organisations.*

4 *In order to facilitate cross-border certification services with third countries and legal recognition of advanced electronic signatures originating in third countries, the Commission shall make proposals, where appropriate, to achieve the effective implementation of standards and international agreements applicable to certification services. In particular, and where necessary, it shall submit proposals to the Council for appropriate mandates for the negotiation of bilateral and multilateral agreements with third countries and international organisations. The Council shall decide by qualified majority.*

5 *Whenever the Commission is informed of any difficulties encountered by Community undertakings with respect to market access in third countries, it may, if necessary, submit proposals to the Council for an appropriate mandate for the negotiation of comparable rights for Community undertakings in these third countries. The Council shall decide by qualified majority.*

6 *Measures taken pursuant to this paragraph shall be without prejudice to the obligations of the Community and of the Member States under relevant international agreements.*

III. Mandatory scope of the new provision

7 The comparison between the wording of the Directive previously in force and the just commented provision make it possible to point out that the latter introduces three different changes. First of all, it changes the type of activity that a provider residing outside the European Union can run. The Directive exclusively referred to *certification-service-providers*, that, according to Art. 2 (1) no. 11 of Directive 99/93/EU, were identified as *an entity or a legal or natural person who issues certificates or provides other services related to electronic signatures*.[1] The Regulation No. 910 of 23-7-2014, in a broader way, instead, refers to all trust services, confirming a more suitable notion which more specifically concerns a certification although other activities are taken into consideration.[2]

[1] Roßnagel/Fischer/Dieskau, *MMR* 2004, 133 ff.; Roßnagel, *MMR* 2000, 451 Ff.; Id., *NJW* 1999, 1591 ff.; Troiano, Nuova giur. civ. comm. 2018, 79 ff.

[2] Roßnagel, *Das Recht der Vertrauensdienste*, 1 ff.; Leone, *Riv. it. dir. pubbl. com.* 2015, 1045 ff.; Finocchiaro, *Nuove leggi civ. comm.* 2015, 419 ff.; Sosna, *CR* 2014, 825 ff.; Cuijpers/Schroers, *GI-Edition Lecture Notes in Informatics*, 2014, p. 23 ff.; Hühnlein, in: Reimer (ed) *ISSE 2014 Securing Electronic Business Processes*, 2014, 241 ff.; Horsch/Derler/Rath/Hasse/Wich, *DuD* 2014, 237 ff.; Quiring-Kock, *DuD*

Moreover, Directive 99/93/EC lacked of an explicit reference to procedural modalities and essential agreement contents stipulated between the European Union and third countries or other international organisations in order to ensure the recognition of services provided by non-residents of the Union: the general reference to *bilateral or multilateral agreement*, supported by an indication of a possible solicitation from the Commission (Art. 7 (1–3) of Directive 99/93/EU) is now replaced by a specific reference to Art. 218 TFEU and by a clear indication of the minimum requirements that the agreement must have in order to ensure the extension of the Regulation to a provider residing in a third country (see also mn. 41–52). **8**

Finally, Article 7(1) of Directive 99/93/EC linked the recognition of a certification activity by a service provider residing outside the Union to three different circumstances, directly involving also a Member State. The case mentioned in the previous point (c), however, was the only one confirmed in 2014, in order to outline an important application problem in case the previous points (a) and (b) should have been fully adopted by the legal systems of Member States (see mn. 53–63). **9**

IV. Inapplicability of the Regulation to trust service providers residing outside the territory of the Union

Even though Art. 14(1) of Regulation No. 910 of 23/7/2014 confirms the territorial limitation of its effectiveness, already outlined by Art. 2(1) (see mn. 2–6 and *sub* Art. 2 of Regulation No. 910 of 23 July 2014), in order to understand to which extent the Regulation is really not applicable to service providers residing outside the Union, the wording of the norm in question should be considered, since it compares *trust services provided by trust service providers established in a third country* and *qualified trust services*. In fact, since Art. 3(1), No. 17, defines a *qualified trust service* as a *trust service that meets the applicable requirements laid down in this Regulation* it cannot be mistaken with a *simple* trust service, which has a different meaning laid down in Art. 3 (1), No. 16 (see mn. 21–34). What is easily noticeable is that trust service providers residing outside the Union cannot provide – when the conditions laid down in Art. 14 of Regulation No. 910 of 23–7-2014 do not apply – exclusively *qualified* trust services.[3] **10**

They are entitled, therefore, pursuant to the norm in question, to perform non-qualified trust services in the Union territories.[4]

In the same way, supporting the inapplicability of the Regulation in question to providers residing outside the Union can be partially misleading. The provider's territory of residence, in fact, affects exclusively the application of the provisions of the Regulation specifically related to *qualified* trust services, since it prevents that the application of these provisions, regarding technical security conditions specified in the Regulation, be sufficient enough to ensure the service provider the opportunity to take advantage of the benefits deriving from the *qualified* character of the service and to ensure the legal effects of the service to users. **11**

This depends essentially on the fact that non-EU provider's territory of residence is not subject to the same controls as providers residing in the Union (see *sub* Art. 20 Regulation No. 910 of 23/7/2014,). Thus, this distinction makes it impossible to guarantee that their services have followed the norms laid down by the Regulation. **12**

2013, 20 ff.; Sädtler, in: Hühnlein and Roßnagel (eds) *Open Identity Summit 2013*, 2013, 121 ff.; Roßnagel/Johannes, *ZD* 2013, 65 ff.; cf. *infra,* mn. 21–34.

[3] 1 Sosna, CR 2014, 829 ss.

[4] Roßnagel, *Das Recht der Vertrauensdienste*, 47 ff.

13 The inapplicability concerns, therefore, the provisions contained in Section 2 (Articles 17–19) and 3 (Articles 20–24) of Chapter III in which the norm in question is laid down, as well as, in general, all the provisions of Section 4 (Articles 25–34), Section 5 (Articles 35–40), Section 6 (Articles 41–42), Section 7 (Articles 43–44) and Section 8 (Art. 45) that deal with *qualified* services, regulating the characteristics, the security requirements and the legal effects.[5]

14 However, there is no reason to deny the application of those provisions to services performed by providers residing outside the Union that, referring exclusively to *simple* trust services, assign a minimum legal effectiveness to these services. It is linked to a mere relevance of the act carried out by means of their implementation in the Union territory. Articles 25(1), 35(1), 41(1) and 46 of Regulation No. 910 of 23-7-2014, in particular, must be considered: electronic signatures, electronic seals, electronic time stamp and electronic document expressly refer to a lack of requirements laid down in the subsequent provisions of the Regulation for their *qualification*. They outline a case in point that is indifferent to the headquarters of the trust service provider or to the law that is applicable to the contract that binds the latter with the user of the service.[6]

15 With regard to the provisions contained in Section 1 (Articles 13–16) in which the same provision in question is found, instead, the Section name (*General provisions*) already suggests that the norms contained in it have a wider scope compared to the following ones, specifically dedicated to the supervisory criteria for the attribution of the term *qualified trust services* or the characteristics of single trust services.[7]

16 The problem of their direct application to providers residing outside the Union, however, concerns only Articles 13 and 15 of the Regulation. Article 16, in fact, addresses directly Member States, imposing on them the duty to establish effective sanctions for infringements of the Regulation. The wording, indeed, does not particularly indicate that sanctions must only be applied to persons residing in the Union. This could be considered sufficient in order to invalidate a reconstructive hypothesis in order to limit its scope only to European citizens or companies established in the territory of the Union, removing it from the rule indicated in the wording of Article 2 (1). However, the effective mandatory scope of Art. 16 is a very modest one since it does not impose sanctions in case of failure to implement the rule by Member States. It will, therefore, depend on the choices of the Member States, when adapting internal rules to the Regulation, to provide an effective system of sanctions for anyone who gives a service having an impact on the territory of the single Member State, regardless of whether the provider is resident or not in the Union. (see *sub* Art. 16 of Regulation No. 910 of 23-7-2014, no. 910).

17 Art. 15 of Regulation No. 910 of 23-7-2014 is, however, not mandatory – but certainly applicable to all trust service providers: the need to ensure fair conditions of access to persons with disabilities, indeed, must be confirmed with specific reference to the place where these people live, so that, if the service provider is established outside the Union, but the user of the services resides in a Member State, there would be an unreasonable discrimination in case it stated that, given the inapplicability of Article 15 of Regulation No. 910 of 23-7-2014, the service can be provided under circumstances that do not ensure access to a disabled person. On the contrary, a wider principle of

[5] Sosna, CR 2014, 830 ff.

[6] Jandt, *NJW* 2015, 1205 ff.; Jordan/Pujol/Ruana, in: Reimer (ed.) *ISSE 2014 Securing Electronic Business Processes*, 2014, 86 ff.; on the different wording of the previous Art. 5 of Directive 99/93/EC, cf. Gavesen/Dumortier/Van Eecke, *MMR* 1999, 557 ff.

[7] Leone, Riv. it. dir. pubbl. com. 2015, 1045 ff.; Finocchiaro, Nuove leggi civ. comm. 2015, 419 (421); Roßnagel, *NJW* 2014, 3689.