



LAW SOCIETY
OF IRELAND

Submission on the Electronic Commerce Act 2000 and Use of E-Signatures

Department of the Environment, Climate and Communications

23 August 2024

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Introduction

The Law Society of Ireland (Law Society) is the professional body of the solicitors' profession in Ireland. With representative, regulatory, and educational functions, the Law Society delivers high-quality legal education and training, and encourages and supports the highest professional standards. The Law Society is committed to participating in discussion and advocacy on the administration of justice and the effective implementation of public policy.

The Law Society is making this submission to the Department of Environment, Climate and Communications to represent our members' concerns regarding the anomalies that exist under the Electronic Commerce Act 2000, and the need for Ireland to update its legislation governing the use of electronic signatures in order to fully reflect the terms of Regulation (EU) No 910/2014 (eIDAS).

This submission outlines the legislative background, puts forward potential solutions and requests engagement by the relevant Government Departments with a view to considering and introducing legislation designed to implement the required changes.

Digitisation is driving significant transformation across business, society and government. A digital agenda underpins many reforms undertaken by the Government recent years to enable people, business and public services interact more effectively. The Law Society notes the Government's digital and ICT strategy for Ireland's public service¹ and also notes the terms of the Digital Ireland Framework². Indeed, the Law Society recognises that Ireland took a pioneering position enacting the 2000 Act to advance digital trade policy. Given the pace of transformation across the global economy, and the widespread availability of high-tech digital services, a renewed ambition is now required to ensure the underpinning legislation supports Ireland's strategic priorities.

The provisions of the Electronic Commerce Act 2000 may be considered outdated and are hampering the ability of the Irish legal system to keep pace with other jurisdictions who have moved, or are moving towards the digitisation of the execution and submission of documentation. Embracing digitisation in this context will, we submit, greatly assist in the conduct of business in Ireland in the twenty first century and will bring about greater efficiencies for the public sector, the legal sector, and ultimately, the consumer.

Electronic signatures or e-signatures come in increasingly different forms. There has long been some uncertainty or a degree of nervousness amongst practitioners around the form and validity of e-signatures, and there are diverging views between law firms in Ireland in respect of the use of e-signatures on certain documents, in particular, documents that are required to be signed in the presence of a witness, for example, deeds. The pandemic proved that e-signatures are a necessity and the legal profession, in common with other sectors of the economy, adapted very well to those challenging circumstances.

¹ Connecting Government 2030: A Digital and ICT Strategy for Ireland's Public Service – Accessible at: <https://www.gov.ie/pdf/?file=https://assets.gov.ie/220390/79ac70c6-f2d9-4b5e-8960-c833a0b40efb.pdf#page=null>

² Harnessing Digital: The Digital Ireland Framework Accessible at: <https://www.gov.ie/pdf/?file=https://assets.gov.ie/214584/fa3161da-aa9d-4b11-b160-9cac3a6f6148.pdf#page=null>

However, the Law Society has concerns that, due to anomalies in the underlying legislation, the widespread adoption and use of e-signatures has not been achieved.

Additional legislative measures which further facilitate the execution of documents by digital means will allow commercial transactions take place in a more timely and cost-effective manner, thereby also increasing Ireland's attractiveness as a jurisdiction in which to do business.

The Electronic Commerce Act 2000 (**ECA**) gave domestic effect to the Electronic Signatures Directive 1999/93/EC (the **Directive**), which was replaced by eIDAS on July 1st 2016.

We note that the UK has updated their equivalent of the ECA, to take account of eIDAS. It is over twenty-three years since the ECA was enacted and the ECA still refers to the now repealed Directive, rather than to eIDAS. We address specific sections of the ECA in this submission but as a general comment we recommend that a 'refresh' of the ECA must include all references in the ECA to "the Directive" being updated to refer to eIDAS (given the Directive is now repealed).

Recommended Amendments to the ECA

Under the ECA, certain types of electronic signatures have the same legal effect as conventional signatures, it provides for the activities of persons who certify the identity of signatories of electronic documents, and it sets up a voluntary accreditation scheme for this. An "electronic signature" is defined under eIDAS as:

"[d]ata in electronic form which are attached to or logically associated with other data in electronic form and which is used by the signatory to sign."

1. Enabling Amendments

The principles of non-discrimination and legal equivalence and recognition of electronic signatures are provided for in sections 9, 13 and 22 of the ECA and we submit that it would be helpful if a "technology neutral" approach be made more explicit and/or be made the default position under the ECA, other than where express provision is made to the contrary.

2. Section 10 of the ECA

As a general comment, we suggest that the introductory wording to Section 10 of the ECA (i.e. '*Sections 12 to 23 are without prejudice to*') is ambiguous and should be clarified to make it clear that certain documents, to include affidavits, are not excluded from the e-signature provisions, noting that both the Rules of the Superior Courts and the Circuit Court Rules have been amended in recent years to facilitate the remote swearing of affidavits.

Section 10 could also be amended to make clear that any types or categories of document which are not specifically referred to in Section 10 can be signed by way of any type of e-signature under eIDAS to include but not limited to via Qualified Electronic Signature ("**QES**") or Advanced Electronic Signature ("**AES**") or Simple Electronic Signature ("**SES**").

We suggest that given the advancements in technology, and the barriers to accessing that technology regularly being lowered, and the general market acceptance and raised level of expectation in relation to the use of e-signatures, Section 10 should be updated by the deletion of the wording highlighted in bold below:

“ ...

- (a) the law governing the creation, execution, amendment, variation or revocation of
 - (i) a will, codicil or any other testamentary instrument to which the Succession Act, 1965, applies,
 - (ii) **a trust**, or
 - (iii) an enduring power of attorney,
- (b) **the law governing the manner in which an interest in real property (including a leasehold interest in such property) may be created, acquired, disposed of or registered, other than contracts (whether or not under seal) for the creation, acquisition or disposal of such interests,**
- (c) **the law governing the making of an affidavit or a statutory or sworn declaration, or requiring or permitting the use of one for any purpose, or**
- (d) **the rules, practices or procedures of a court or tribunal.”**

In relation to affidavits and statutory or sworn declarations, and indeed to witness statements, expert reports, and pleadings, subject to appropriate safeguards being put in place to mitigate any associated risks, e-signatures seem far more practical in the context of the difficulties in attending in front of a third party, which became particularly evident and problematic during the pandemic, thereby improving accessibility generally.

Utilising an electronic signature, depending on the platform used, can in itself be a record of what the signatory has seen in the document, or been offered the opportunity to consider, before the signer proceeded to sign the document.

3. Section 13 of the ECA

We suggest that the requirements in Sections 12(2)(c), 13(2) (b), and 18(2)(e) of the ECA in respect of consent to the use of e-signatures are no longer required.

The presence or absence of a clause saying that the parties consent to electronic signatures in a contract being signed by electronic signature should not have any effect on the validity of the contract. This is not a requirement under eIDAS and electronic signatures are far more widespread and better understood now than when the ECA was originally enacted.

The consent requirement may still be relevant in the context of public bodies as per Sections 12(2)(b), 13(2) (a), and 18(2)(d) of the ECA. Tailte Éireann (TE) have commented that TE's consent to the use of e-signatures is required under the ECA and, until such time as a system has been developed and implemented, TE are not in a position to accept electronic / digital signatures on Land Registry or Registry of Deeds forms. In order for the current provisions of

the ECA or any legislative amendments thereto to become adopted on a more widespread basis in conveyancing practice, the approach being considered by TE to facilitate the acceptance by TE of electronic and digital signatures will need to be implemented.

4. Section 14 of the ECA

We suggest that section 14 of the ECA be deleted and replaced with a provision permitting and enabling remote witnessing, subject to appropriate safeguards being put in place to mitigate any associated risks and remaining without prejudice to any existing or updated court rules facilitating the remote witnessing of High Court and Circuit Court affidavits.

Any replacement wording should make it clear that any type of e-signature under eIDAS is permitted to be used (by any signatory or witness) where witnessing is desired or required, to include the witnessing of an attorney's signature to a deed pursuant to a power of attorney. The replacement wording should also make it clear that any such signature can be witnessed remotely, i.e. witnessing can mean something other than being in the physical presence of the person signing and witnessing via audio-visual technology / e-signature platform providers / video link is permitted.

At present, to be certain that a deed has been validly executed, a witness must be in the physical presence of the signer to witness the act of signature (whether that signature is electronic or 'wet-ink'). Simplifying and promoting the process of signing electronically will require a similar clarification and simplification process for witnessing those signatures if the overall aim is to be achieved.

5. Section 16 of the ECA

In 2020 the Law Society made a submission to the Joint Committee on Enterprise, Trade and Employment on the General Scheme of the Companies (Corporate Enforcement) Authority Bill which, among other things, recommended that Section 43(1) of the Companies Act 2014 be amended to include wording so that a company may have a common seal, but is not required to have one, and that remains the recommended approach. We attach a copy of that submission for ease of reference. If dispensing with the need for a physical/engraved company seal altogether is not presently achievable, an amendment could be made to make it clear that any type of e-signature under eIDAS could be an alternative to the physical affixing of the common seal.

The ECA does not cater for the use of an electronic seal, but Articles 35-40 of eIDAS establish the separate concept of the electronic seal which applies solely to legal persons. Articles 39 and 40 of eIDAS direct that the relevant provisions dealing with qualified electronic signature creation devices and those dealing with the validation of electronic signatures apply "*mutatis mutandis*" to electronic seals.

Assuming the company seal remains a requirement in the near term, the legislation could be somewhat future proofed now in case the requirement for a common seal is subsequently dispensed with/made optional.

Section 16 of the ECA could be updated with wording such as, for example:

"Where a company is permitted or required to execute an instrument under its common seal, electronic execution by any or all signatories and counter signatories via any type of e-signature under eIDAS to include but not limited to via QES or AES is sufficient and any execution in this manner will be treated as equivalent to execution under its common seal, and the common seal will not need to be affixed".

This update would be “*without prejudice to other permitted execution methods, electronic or otherwise. Where a company seal is physically affixed, the signatory and counter-signatory may use any type of e-signature (if applicable) under eIDAS to include but not limited to via QES or AES or SES, and / or wet-ink signatures, in any combination and such ‘counterparts’ will together constitute a single document*”.

6. Section 18 of the ECA

Section 18(2)(a)

This section refers to “*reliable assurance as to the integrity of the information from the time when it was first generated in its final form as an electronic communication*” but no guidance is provided as to what is necessary to ensure integrity of information, or how integrity might be established. We suggest that such guidance is specified or that this subsection be clarified.

Section 18(2)(c)

We are unclear as to the purpose of this provision in the current technological age where documents are readily accessible and useable for future reference. We suggest that the purpose behind this section be identified and made clear.

7. Other general ECA amendments

We suggest:

- (i) references throughout the ECA should be consistent with eIDAS “electronic signature” types and definitions, and
- (ii) any references in the ECA to an “advanced electronic signature based on a qualified certificate” (AES/QC) (and corresponding definition) should be removed (as AES/QC does not exist under eIDAS and isn’t available in the market at the date of this submission).

Conclusion

For the reasons set out above, the Law Society requests that the Minister for Environment, Climate and Communications consider the proposals that we have outlined in this Submission, with a view to introducing amending legislation to correct the deficiencies that we have identified.

While recognising that there are some cohorts within Irish society that do not have a high level of technological literacy, the general public’s comfort with electronic means of signing and transacting continues to grow, and the Law Society is of the view that updating the law governing e-signatures would facilitate the efficient execution of documents in a more timely and cost-effective manner, both in the context of commercial transactions and in transactions involving consumers. As noted above, we believe that modernising the law in this area would also increase Ireland’s attractiveness as a jurisdiction in which to do business. In view of Ireland’s pioneering approach to the adoption of the Electronic Commerce Act 2000, and its position as a leading centre for many of the world’s largest technology, financial services and life sciences firms, it seems entirely fitting that the law in this Ireland would be more progressive than is presently the case.

This submission does not address amendments to the Companies Act 2014 or the Land and Conveyancing Law Reform Act 2009 or court rules, all of which would likely also be required or desirable to facilitate or implement the proposals that we have outlined in this Submission. We are happy to provide further details in this respect, if requested to do so.

The Law Society would be pleased to expand on any aspect of this submission, and if requested to do so, would also be prepared to present the Heads of a Bill designed to give effect to the proposals advanced in this Submission.

The Law Society available to meet with you to discuss any aspect of this Submission if that would be of assistance.

For further information on any aspect of this submission, please contact the Policy Department of the Law Society of Ireland at: PolicyTeam@LawSociety.ie



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